82-2105
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL VAN McDOUGALL

Petitioner

-against-

STATE OF NORTH CAROLINA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

---

*JAMES C. FULLER, JR.
JAMES E. FERGUSON, II
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
951 S. Independence Blvd.
Suite 730
Charlotte, North Carolina
28202
704/375-8461

*ATTORNEY OF RECORD

QUESTION PRESENTED

Whether the North Carolina Supreme Court misinterpreted Lockett v. Ohio, 438 U.S. 586 (1978) by affirming a trial court's charge in a death penalty sentencing hearing in which the jury was effectively forbidden to consider any mitigating factors unless such factors quantitatively outweighed the aggravating factors?

TABLE OF CONTENTS

APPENDICES:

TABLE OF AUTHORITIES

Federal Statutes:

28 U.S.C. §1257(3)

North Carolina Statutes:

N.C. Gen. Stat. §15A-2000 et seq.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL VAN McDOUGALL

Petitioner

-against-

STATE OF NORTH CAROLINA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

Petitioner, Michael Van McDougall, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ___N.C. ___, 301 S.E.2d 308 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was issued on 5 April 1983. The judgment of the Supreme Court of North Carolina was issued on 25 April 1983, and is attached hereto as Appendix B.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). Petitioner has asserted below and now asserts a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the North Carolina death penalty statute, N.C. Gen. Stat. §15A-2000 et seq., which is attached as Appendix C.

STATEMENT OF THE CASE

On the morning of 21 August 1979, Mecklenburg County police officers answered a call to a Blueberry Lane residence in Charlotte, North Carolina where they found one young woman seriously injured and another dead. The police found the defendant, Michael McDougall, in his front yard next door. McDougall was arrested on the scene and in September 1979 indicted with the murder of Diane Parker, the assault with a deadly weapon with intent to kill of Vicky Dunno that resulted in serious injuries, felonious breaking and entering, kidnapping of Vicky Dunno, and kidnapping of Diane Parker.

(R pp 3-7)*

After several preliminary hearings and postponements, the trial began on 9 June 1980. (R pp 96-97). Defendant raised a defense of not guilty by reason of insanity. (R pp 60-61).

Upon this plea of not guilty, the jury rendered verdicts as follows:

1. First degree burglary--not guilty
2. Kidnapping Vicky Dunno--not guilty
3. Kidnapping Diane Parker--guilty
4. Assault with a deadly weapon of Vicky Dunno--guilty
5. First degree murder--guilty only under the felony murder rule. (R pp 114-115). This verdict was filed on 21 July 1980 (R p 114), three days after the jury found

* All page citations in the Statement of the Case and the Statement of Facts refer to the Record (R p x) or Transcript (T p x), both of which are filed in the Office of the Clerk, North Carolina Supreme Court.

the defendant to be sane under specially submitted interrogatories. (R p 113).

On 25 July 1980, after two days additional testimony, the jury found that there were aggravating circumstances, that there were mitigating circumstances, that the mitigating circumstances were not sufficient to outweigh the aggravating circumstances, and that the aggravating circumstances called for the imposition of the death penalty. Therefore, the jury was directed to recommend a sentence of death. (R pp 118-19). On the same day, Superior Court Judge Ferrell entered judgments as follows:

1. In 79CRS67084, kidnapping of Vicky Dunno, upon a verdict of not guilty, the case was dismissed. (R pp 119-20).

2. In case No. 79CRS67087, first degree burglary, upon a verdict of not guilty, the case was dismissed. (R p 120).

3. In case No. 79CRS47734, assault with a deadly weapon of Vicky Dunno, upon a verdict of guilty, defendant was sentenced to not more and not less than 20 years in prison. (R p 121)

4. In 79CRS67081, kidnapping of Diane Parker, upon a verdict of guilty, the defendant was sentenced to a minimum and maximum of life to be served consecutively. (R pp 122-124)

5. In 79CRS47697, first degree murder, upon a verdict of guilty and a recommendation of death, the judge ordered the defendant to be killed. (R pp 124-26).

From the trial Court's judgment of conviction and sentence of death, petitioner appealed. The judgment of the Supreme Court of North Carolina affirming the convictions and sentence has now been filed, ___N.C.___, 301 S.E.2d 308 (1983) (Appendix A).

STATEMENT OF FACTS

On 21 August 1979, between 2:30 and 2:45 a.m., a Charlotte police officer noticed a

flatbed truck with wooden stakes and iron railings at an intersection, heading South out of town. The officer noticed that the truck was being driven "in a normal manner," although he thought it unusual that such a vehicle was on the street at such a time. He looked directly at the driver's face. (T pp 1661-63).

Shortly after 3:00 a.m. the same officer, responding to a police dispatch, went to a residence on Blueberry Lane, located in the same geographical area as where he had seen the truck. There, he saw the same truck, the driver--who he would later identify at trial as the petitioner--and the body of Diane Parker. (T pp 1663-64).

The officer went into 1420 Blueberry

Lane, the residence of Diane Parker and Vicky Dunno, where he saw "bloodstains on the walls and doors." (T pp 1668). Nearby, lying on the livingroom floor, was Dunno, severely wounded. (T p 1669). Outside, the officer found a knife, a piece of broken knife blade, and a pair of eyeglasses. (T p 1670).

On that date, Diane Parker and Vicky Dunno lived together on Blueberry Lane, about one and a half miles from the intersection where the officer saw the truck. (T pp 1663, 1916). They had retired shortly before midnight. (T p 1921).

Between 2:30 a.m. and 2:45 a.m., Dunno heard the door bell ring. As she tried to see the caller, Parker was talking through the closed front door to a

male who said that "his wife had cut her leg real bad and that he needed alcohol and bandages and to call a doctor." (T p 1923). Calling for "Diane," the voice asked for help for his wife, saying that he was "her neighbor, Mike." (T pp 1924-25). Initially the two women put alcohol and dressings on the back porch for the caller. However, he importuned them to open the door. Finally, Parker did. (T p 1926). At trial, Dunno identified the caller, whom she had seen by porch and interior lights, as petitioner. (T p 1927).

Once inside, petitioner followed the women into the kitchen where Parker picked up the phone to call a physician. However, before Parker could dial, petitioner "walked over [to a spot 4-5 feet]

behind Diane. . . where we had a cutting board, and picked up a butcher knife." (T p 1929). He then "grabbed her by the arm, put the knife up in front of her face" and "told her to put down the phone." A struggle followed on the floor, with phone and stools knocked about, as Parker tried to get away. (T p 1939).

At Parker's suggestion, Dunno ran out the front door to seek help next door. As she rounded the porch, dew caused her to slip. She was searching for her glasses in the grass when defendant came up, "grabbed me by the arm, and told me I wasn't going anywhere." (T p 1932).

At that instant, Parker appeared with a knife in her hand, telling peti-

tioner that "if he hurt [Dunno], that she'd kill him." Petitioner released Dunno and, after a brief struggle, fell to the ground with Parker. Dunno told Parker not to fight because of the knife. Dunno heard one knife land beside a nearby car. (T pp 1932-33).

Parker then "stopped struggling." The petitioner "grabbed [Parker] by the back of the hair, grabbed [Dunno] by the back of the hair, and drug both of us back inside." Dunno suffered cuts and bruises on knees and ankles from the dragging. (T p 1934). Inside, she saw that Parker was bleeding from face and forehead. (T p 1935).

At petitioner's insistence, Dunno gave him her car keys. "He still had hold of Diane, and so I started out in

front of him, and the three of us went back outside to the car," where petitioner "turned Diane loose." She walked around to the back side of the car. (T pp 1935-36). Petitioner returned the keys to Dunno, asking for the trunk key as he told Parker he intended to put both "in the trunk until we got where we were going, and then he'd let us out."

At Parker's suggestion, Dunno then threw the keys into the grass. Petitioner then became, "very angry that I had thrown the keys . . ." He pushed Dunno to the ground and stabbed her a number of times. She yelled to Parker who ran. (T p 1937). The petitioner "left me and ran after [Parker]." When petitioner and Parker disappeared from

sight, Dunno went inside, locked the door and dialed the emergency number. (T pp 1938-39).

Police arrived shortly. Dunno recounted the events, describing the assailant as "tall and heavy-set had dark hair and had on a plaid shirt." (T p 1943).

Dunno was then taken by ambulance to the hospital where she underwent surgery for injuries to her lungs, abdomen and diaphragm. She was in intensive care for almost a week and was released from the hospital in something over six weeks, returning to work but still unable to lift or move about without discomfort. (T pp 1945-46).

Petitioner pled not guilty by reason of insanity. Petitioner's

psychiatric witnesses stated that he was not capable of discerning right from wrong at the time of the incident described above. On the night of the stabbings, petitioner's pre-existing emotional and psychological problems were greatly exacerbated by the intravenous ingestion of a large amount of cocaine. In a frenzy of drug-induced dementia, the petitioner evidently relived a number of childhood traumas including mistreatment he had personally experienced. According to the psychiatric testimony, he lost all control and began to strike out at the two victims because he psychologically identified them with excruciatingly vivid childhood trauma. As he relived an incredible childhood that included the murder of his

own father, and a grisly scene in which his grandfather committed suicide in the child's presence, the defendant repeatedly stabbed both victims. (The State's psychiatric experts, from the State's mental hospital, thought petitioner's capacity to appreciate the criminality of his acts diminished, but suggested he was legally sane.)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner asserted in the North Carolina Supreme Court that the trial court submitted penalty phase issues, and charged the jury, in a manner that violated Lockett v. Ohio and denied to petitioner his right to due process of law. This argument was briefed and argued in the North Carolina Supreme Court

as defendant-Appellant's Question 5. (Defendant-Appellant's Brief, p 37). The State responded to the petitioner's contentions, thus presenting the issue squarely before the North Carolina Supreme Court. (State-Appellee's Brief, PP 29-32).

The majority rejected the petitioner's argument, although without any identifiable rationale. (Appendix A, pp A63-A66). While noting twice that the trial judge's charge in the penalty phase was "not a model charge," the majority determined that the judge's charge was "substantially the same" as that proposed by petitioner in his Brief. In fact, as noted by dissenting Justice Exum, that is not the case at all. (Appendix A, pp A97-A100). In point of

fact, the majority simply glossed over that portion of the trial court's charge that clashed irreconcilably with Lockett. Ironically, the State, in its Brief, noted the obvious conflict, but sought to explain away the implications of the Lockett violation. Strangely, the majority chose to ignore the conflict by a generalized reference to the entire charge: One searches in vain for any language in the charge to justify the majority's conclusion.

Here, the majority has not--and could not--attempt to interpret the North Carolina Death Penalty Statute "solely as a matter of [local] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). Rather, the absence of any meaningful reliance

upon its own prior decisions or upon North Carolina statutes compels the conclusion that the North Carolina Supreme Court interpreted the statute because it felt "under compulsion of federal law. . ." Missouri ex rel. Southern Rwy Co. v. Mayfield, 340 U.S. 1, 5 (1950).

The majority's reference to Lockett therefore shows that, at best, there are intertwined questions of state and federal law that are "so interwoven" as to make it impossible to determine "that the judgment rests upon an independent interpretation of State law." State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Therefore, the North Carolina Supreme Court's treatment of this question as one arising under the federal constitution, and the

undeniable federal constitutional implications that arise under Lockett, properly present this as a primarily federal issue that is ripe for determination. See Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

Since both parties below dealt with this question directly and extensively, and since the North Carolina Supreme Court gave full treatment to the question, though its apparent resolution of the issue is based entirely upon a misapprehension of federal law, the question is properly before this court by petition for certiorari.

Finally, the question presented affects not only theoretical constitutional questions but practical implication of life or death for petitioner,

for others now on death row in North Carolina, and, potentially, in many other cases to come. Therefore, the federal question is indeed a critical one for which both the courts and the legislative bodies "deserve the clearest guidance that the Court can provide." Lockett, 438 U.S. at 602. Simply put, it is whether a state may constitutionally sustain a sentencing procedure in which a defendant is put to the burden of proving that his mitigating factors quantitatively outweigh the State's aggravating factors--or face the jury's life or death question with all matters in mitigation removed from the jury's consideration. The North Carolina Supreme Court's decision in this case not only puts the practice in this

jurisdiction on a collision course with Lockett, it utterly fails to provide a process that is "consistent and principled but also humane and sensible as to the uniqueness of the individual." Eddings v. Oklahoma, ___U.S. ___, 71 L.Ed.2d 1, 8 (1982).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE NORTH CAROLINA SUPREME COURT'S AFFIRMANCE OF A DEATH SENTENCE IMPOSED IN VIOLATION OF THE FOURTEENTH AMENDMENT AND LOCKETT v. OHIO WHERE THE TRIAL JUDGE REFUSED TO ALLOW THE JURY TO CONSIDER MITIGATING FACTORS UNLESS THEY QUANTITATIVELY OUTWEIGHED THE AGGRAVATING FACTORS OFFERED BY THE STATE

Although not required to do so by North Carolina's death penalty statute, N.C. Gen. Stat. §15A-2000(b), the trial judge presented the issues in such a

manner as to absolutely preclude any consideration of mitigating factors unless the aggregate weight of the mitigating factors was sufficient to outweigh the combined weight of the aggravating factors.

General Statute 15A-2000(b) requires a jury's life or death determination to be based upon the following considerations:

> 1. Whether any sufficient aggravating circumstances or circumstances as enumerated in subsection (e) exist;
>
> 2. Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
>
> 3. Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

As written, this statute does not remotely suggest the bizarre result reached by the trial court. To the contrary, the phase based upon these considerations would normally connote a thoughtful weighing of both aggravating and mitigating factors in making the awesome decision. However, this three-prong standard did not survive a judicial mutation intact. When presented to the jury at petitioner's trial the life/death issues were:

> 1. Do you find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances? (See Appendix E for list of issues submitted to the jury.)
>
> 2. Do you find from the evidence the existence of one or more of the following mitigating circumstances? (See Appendix E for list of issues submitted to the jury.)

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

One notes at the outset that the jurors were to answer the questions in order and, upon an answer sequence of yes-yes-no-yes, the jury was absolutely required to return a verdict of death.*

The first of the two Questions are worded clearly and properly. Neither causes a concern. The semantics con-

* Although styled a "recommendation," the jury's verdict is absolutely binding on North Carolina trial judges who have no discretionary authority in the sentencing phase.

fusion that may result in a jury sentencing a defendant to his or her death against the will of the jury, and against the law of the land, comes in the interrelationship of Questions 3 and 4.

As worded, Question 3 requires a jury to quantitatively weigh the mitigating factors against the aggravating factors. If the mitigating prevail in these subjective mental scales, the case ends and life is imposed. But, if mitigating loses, even by the slightest of margins on this delicate scale, the jury proceeds to Question 4. There is no differentiation between a case in which the scales tip by a mote and a case with a beam in one side's tray.

Question 4, then, drops all reference to mitigating factors and

requires the jury to determine only whether the aggravating factors--standing alone--are sufficient to justify the State's killing this defendant or some other. No amount of semantic revisionism can becloud the logical import of Question 4 as phrased in petitioner's trial. Simply put, where, as here, the jury finds the mitigating factors do not outweigh the aggravating factors, a juror, to follow the court's mandate faithfully, must completely ignore the mitigating circumstances and, in total disregard of the mitigating circumstances, determine whether the aggravating circumstances warrant the death penalty. Such an instruction is a clear violation of Lockett's requirement that any and all mitigating factors be con-

sidered in determining whether death or a lesser penalty should be imposed.

To illustrate, assume some weighted continuum between a case in which a juror certainly would vote life and one in which that same juror would vote death.* In one horrible, hypothetical case, the circumstances attendant to the murder might "score 100" as one of the most atrocious crimes imaginable. In that instance, a single mitigating factor, while found to be present, could be so insignificant as to "score 10." The differential is 90 in favor of the aggravating and, so, by this juror's subjective analysis, death is appropriate.

*The example does not assume a mechanistic, numerical formula imposed by the court. Rather, it assumes a subjective but rational process with a scale of 1 to 100 used only for illustrative purposes.

In another case, recognizing all murders to be terrible, the particular facts could cause this hypothetical juror to give it an aggravating "score of only 55." In this second example, there might be several, substantial mitigating factors, sufficient to "score 50." However, in both instances the mitigating do not outweigh the aggravating and, so, this sample juror must move to Question 4.

As phrased in petitioner's trial, the juror's must now decide <u>life</u> or <u>death</u> solely by determining the answer to Question 4:

> Are the aggravating circumstances "sufficiently substantial to call for the imposition of the death penalty?

In the first hypothetical, there is little likelihood of prejudical error in

the process since the comparative analysis is so skewed in favor of the aggravating. Assuming a juror at all disposed in favor of death as a penalty, the differential of 90 is likely to meet that juror's death standard--the point at which the juror's subjective analysis of the factors pro and con lead him or her to vote death. Yet in the second example, which may be petitioner's case, the juror who would sentence to death upon a differential of 90--or 75 or 50 or even 25--might not, probably would not, issue a decree of death where the aggravating factors outweigh the mitigating by only 5.

Yet in both cases, so different both qualitatively and quantitatively, the sentence will be, in fact must be,

death if the aggravating factors alone would call for death as the punishment.

Nor does the judge's charge in petitioner's case cure the problem. To the contrary, the jury is admonished to answer the questions in order and the jury is then directed to impose death if it answers Question 3 no and Question 4 yes.

On Question 4 the trial judge's charge did not in any way modify the sequence of four questions that led inexorably to petitioner's death sentence. The judge simply said:

> On this [Fourth] issue the burden is on the State to prove to you from the evidence beyond a reasonable doubt that the aggravating circumstances found, if any, are sufficiently substantial to call for the imposition of the death penalty.
>
> Substantial means having substance or weight, important, significant or

> momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer "Yes," you must agree unanimously that they are.
>
> If you unanimously find beyond a reasonable doubt that any aggravating circumstance or circumstances found by you are sufficiently substantial to call for the death penalty, you would answer this issue "Yes." If you do not so find, or have a reasonable doubt, then you would answer this issue "No."

(Appendix D at D26-D27).

Nowhere in his explanation of the fourth question did the judge even mention mitigating circumstances.

In its opinion below, the North Carolina Supreme Court majority concluded

that the charge was "not a model charge" but was "free from prejudicial error." (Appendix A at A66). The majority made no attempt to explain this conclusion and pointed to no language in the trial judge's charge which softened the unfairly harsh and mechanical result of Question 4. In fact, nothing in the trial court's charge even remotely complies with Lockett's admonition to consider all mitigating factors in reaching the ultimate decision. (See Appendix D).

Ironically, the North Carolina Supreme Court did say that "the death penalty should not be imposed where the sentencer may be prevented from considering all mitigating circumstances in making the ultimate life or death determination," (Appendix A at A64). Yet it is

manifestly clear that precisely such prevention occurred. The majority's inability to find even a line in the judge's charge to support his true-enough statement is a tacit acknowledgement of the error of the ruling.*

In an opinion concerning the denial of cert in Smith v. North Carolina, ___U.S.___, 74 L.Ed.2d 622 (1983), Justice Stevens noted "an [a]mbiguity

*Another hint of error may be gleaned from the initial opinion handed down in State v. Williams at the precise moment the McDougall opinion was conditionally filed on 5 April 1983. The body of the Williams opinion purported to quote at length from McDougall. Incredibly, those quotes included an inference that the trial judge in McDougall had made clear, prejudicial, and reversible error. Williams, which apparently quoted from a final draft of McDougall, flatly stated that McDougall would receive a new sentencing hearing. Within hours, Williams was withdrawn to be re-written.

in these instructions that may raise a serious question of compliance with this Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978)." The trial court in McDougall formulated the instructions in precisely the manner questioned by Justice Stevens as being inconsistent with the holding of Lockett.

The State's brief in McDougall demonstrates that the trial judge's instructions were in fact given in an impermissible way. Indeed, the State read the McDougall instructions in exactly the manner about which Justice Stevens expressed concern, but argued that such an interpretation did not violate the Constitution:

> The instruction, after prefatory language, still sends the jury back to the aggravating factors alone to determine if they are in themselves

> sufficiently substantial to warrant punishment by death as the trial judge required the jury to do in the matter now before this Court. (State's Brief at 31) (emphasis added)

The State went on to argue that such a formulation of the instructions is "substantially the same" as that given in numerous other North Carolina cases and must therefore be acceptable.

Justice Exum, dissenting from the majority opinion in McDougall, agreed that the trial court incorrectly instructed the jury. Noting Justice Stevens' warning* in Smith, he noted the

*Perhaps, the opinion might better be viewed as an expression of concern or even as an invitation to the North Carolina courts to deal with the question to avoid a federal challenge. By special motion, petitioner brought to the North Carolina Supreme Court Justice Stevens' opinion. Therefore, whether warning, expression, or invitation, the suggestion to moot the issue was ignored or rejected.

same inconsistency in the majority's view as petitioner here urges the Court to rectify:

> I believe, however, that the trial judge's formulation of and instruction on the 4th issue constituted error entitling defendant to a new sentencing hearing.
> (Appendix A at A97).

As Justice Exum suggests, simply enunciating a constitutional rule of law cannot by itself correct gross unconstitutionality in the application of that law. A grant of certiorari in this case will give the Court an opportunity to correct a misapplication of an important and federal constitutional principle and, in so doing, will provide much-needed guidance on the proper interpretation in light of Lockett, of death penalty statutes like North Carolina's that call

for a balancing of aggravating and mitigating circumstances.

Recent decisions of the North Carolina Supreme Court have made the need for Supreme Court review in this case even more urgent. Although the death penalty statute calls the jury's sentencing determination a "recommendation," N.C. Gen. Stat. §15A-2000(b), the state Supreme Court has held that the jury's "recommendation" is in fact binding on the trial court. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert denied, ___U.S.___, 74 L.Ed.2d 622 (1982); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, ___U.S.___, 74 L.Ed.2d 662 (1982); State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, ___U.S.___, 74 L.Ed.2d 622

(1982). Thus, the jury's affirmative answer to Question 4 of the judge's charge made punishment by death mandatory for petitioner.

These decisions of the North Carolina Supreme Court, coupled with the defective instruction given by the trial judge in the McDougall case, have resulted in the automatic imposition of a death sentence that was without a full, constitutionally-required assessment of all relevant factors. Such a procedure raises serious questions of constitutionality not only under Lockett v. Ohio but also under Woodson v. North Carolina, 428 U.S. 280 (1976), which held mandatory death penalty statutes unconstitutional because they prohibit the exercise of any meaningful, rational judgment in the

decision to kill a defendant such as McDougall.

CONCLUSION

Petitioner was sentenced under an interpretation of the North Carolina death penalty statute that directly violates the mandate of the Constitution as expressed by this Court in Lockett v. Ohio. Justice Stevens recognized the problem with the North Carolina rule in Smith v. North Carolina. Justice Exum pointed it out in his dissent from the North Carolina Supreme Court's opinion in McDougall. Even the North Carolina Attorney General acknowledged the problem in its Brief to the North Carolina Supreme Court. Review by this Court should be granted to clarify the proper

interpretation of such death penalty statutes and to prevent a man from going to his death under a sentence that was imposed in a manner manifestly contrary to the dictates of the Constitution of the United States.

For these reasons, petitioner respectfully prays the Court to grant the writ of certiorari.

Respectfully submitted,

JAMES C. FULLER, JR.
JAMES E. FERGUSON, II
Chambers, Ferguson, Watt, Wallas,
Adkins & Fuller, P.A.
951 S. Independence Boulevard
Suite 730
Charlotte, North Carolina 28202
704/375-8461

ATTORNEY OF RECORD

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was mailed to Joan Byers, Assistant Attorney General and counsel of record for the State of North Carolina on 24 June 1983.

Chambers, Ferguson, Watt, Wallas,
Adkins & Fuller, P.A.

By: Jim Fuller

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	No. 86A81 Mecklenburg
	)	
MICHAEL VAN McDOUGALL	)	

Appeal by defendant from judgments entered by Ferrell, Jr. at the 9 June 1980 Session of Superior Court, Mecklenburg County.

Defendant was convicted by a jury of assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and murder in the first degree. For his conviction of murder in the first degree, defendant was sentenced to death. He was also sentenced to consecutive prison terms of twenty years on the conviction of assault with a deadly weapon with intent to kill inflicting serious injury and life imprisonment on the charge of kidnapping. Defendant appeals to this Court as a matter of right from judgments entered with respect to his convictions of murder in the first degree

and kidnapping. Defendant's motion to bypass the Court of Appeals for review of the judgment entered with respect to his conviction of assault with a deadly weapon with intent to kill inflicting serious injury was allowed by this Court 5 March 1982.

RUFUS L. EDMISTEN, Attorney General, by JOAN H. BYERS, Assistant Attorney General, for the state.

CHAMBERS, FERGUSON, WATT, WALLAS, ADKINS & FULLER, by JAMES C. FULLER, JR., for defendant.

MARTIN, Justice.

I.

Evidence for the state tended to show that at approximately 2:30 a.m. on the morning of 21 August 1979, Officer W. K. Crisler saw a flatbed truck at the intersection of Fairview Road and Sardis Road in the city of Charlotte. The flatbed truck was stopped at a traffic light and was headed away from Charlotte. The police car also was stopped at the intersection, headed in

the opposite direction. Because in the mind of the officer it was unusual for such a truck to be driven at that time of night, he observed the truck closely. It was being operated in a normal manner. As the two vehicles passed each other, the officer had ample opportunity to observe the driver of the truck and later identified him as the defendant, Michael McDougall.

The intersection where Officer Crisler observed McDougall was located some one and one-half to two miles from 1420 Blueberry Lane in the city of Charlotte. Vicki Dunno and Diane Parker lived together in a house at 1420 Blueberry Lane. Approximately fifteen minutes after Officer Crisler had observed the flatbed truck, Vicki and Diane were wakened by the ringing of their front doorbell. They went to the front door and heard a male begging to be admitted into the house. This person stated

that his wife had cut her leg "real bad," that he needed alcohol and bandages for her, and that he needed to call a doctor. He continued to beg for help. Diane went to the bathroom and got alcohol and bandages which she put outside the back door. She then came back to the front of the house. When the person began calling Diane by name, saying that he needed to talk to her, that he needed help, that his wife was hurt, Diane answered for the first time. He said that he was her neighbor Mike, that his wife was hurt "real badly," and that he needed help. After he continued pleading and begging to get into the house, Diane Parker finally opened the door and let him in. The person was Michael McDougall.

The three persons went into the kitchen where Vicki Dunno got the telephone directory off the refrigerator for the purpose of calling a doctor. While Vicki was looking up a number,

the defendant walked from the kitchen into the den and began to "check out the house." Diane then took the telephone book from Vicki and started to dial for help. McDougall came back from the den into the kitchen, walked over behind Diane to the corner where there was a cutting board, and picked up a butcher knife. Vicki told Diane to look out, that McDougall had a knife. Defendant grabbed Diane by the arm, put the knife up in front of her face, and told her to put down the phone. Diane tried to get away from him and in the struggle the two knocked over one of the kitchen stools and the phone was knocked out of Diane's hand. They fell to the floor. Diane told Vicki to go next door and get help. Vicki ran out the front door. When she got to the grass, it was wet and she slipped, fell to her hands and knees, and her glasses flew off. She was searching in the grass for her glasses when the

defendant came running out of the house, grabbed her by the arm, and told her that she wasn't going anywhere. Diane then came out of the house and was standing in the driveway. She had a knife in her hand and told McDougall that if he hurt Vicki she would kill him. McDougall realized that Diane had a knife. He let go of Vicki, then went over and started struggling with Diane and got her down in the grassy area beside the bushes. Vicki screamed and pleaded with Diane not to fight because she knew that McDougall had a knife. Vicki heard one of the knives thrown down the driveway. Diane then stopped struggling and McDougall grabbed her and Vicki by the back of the hair and dragged both of them back into the house. When the three got back into the house, Diane was bleeding from her forehead and nose. McDougall was a big man, weighing about two hundred and twenty pounds and standing six feet two inches

tall. Vicki was twenty-five years old, five feet ten inches tall, and weighed one hundred and thirty pounds. Diane was twenty-seven years old, five feet two inches tall, and weighed one hundred and twenty-five pounds.

McDougall demanded that Vicki get her car keys. They went to her bedroom; Vicki got the keys and gave them to him. He was still holding Diane and took the two women back outside to the car. He gave the keys to Vicki and asked her which key was the trunk key. He said that he was going to put the women into the trunk until he got where he was going and he would then let them out. Diane told Vicki not to give him the keys, and Vicki threw them away. McDougall was very angry and threw Vicki to the ground and started stabbing her. She screamed to Diane, and Diane ran in the direction of a neighbor's house. McDougall left Vicki and ran after Diane and caught her.

Vicki, in the meantime, got up and went into the kitchen to call for help on the telephone. She dialed the emergency number, 911, and reported the incidents. Lynda McDougall, the wife of the defendant, then telephoned and asked Vicki what was happening. Vicki told her that she had been stabbed and that her roommate was outside with the assailant.

When the police arrived they found Diane Parker's body sprawled in front of 1400 Blueberry Lane, Michael McDougall's home. Vicki Dunno gave a description of the defendant to the officers and told them what had happened. An ambulance arrived and Vicki Dunno was taken to the hospital, where she remained in intensive care for some time. Her condition required surgery, and she has been left with permanent scarring as a result of being stabbed some nine times.

Diane Parker's body was clothed only with

a nightgown, which had been pulled up to her chest, exposing her pubic area and one breast. Her knees were pulled up and her legs parted wide. Her genitalia appeared to have some liquid upon it. Diane had been stabbed some twenty-two times. She also had other contusions about her body. Any one of several of the stab wounds could have caused her death. At least two of the stab wounds entered her heart. Most of the wounds had been inflicted while she was in a prone position. She had cuts across the palm of her hand which a doctor who testified characterized as defensive type wounds. She had lost approximately half of the volume of her blood. Several of the wounds were from four to six inches deep. The medical examiner testified that in his opinion the butcher knife which was found at the scene of the crime and which was offered into evidence could have caused the wounds to Diane Parker.

The officers brought in searchlights to aid in the investigation, and once these lights were operating the defendant came out from behind some bushes, saying "I give up. Okay, I give up." There was blood smeared on his person, shirt, and pants. A blood analysis later showed that the blood on McDougall matched Diane Parker's blood type.

For two weeks during trial the defendant put on extensive evidence indicating that he suffered from a cocaine induced psychosis, as well as underlying depression and organic brain damage. This evidence showed that he had suffered severe and traumatic experiences as a child. For example, his grandfather committed suicide in his presence. Defendant's evidence indicated that he had injected nearly five grams of cocaine before he came to the Dunno residence. On the night of the arrest a sample of defendant's blood was taken; however, this blood was not analyzed until

some nine or ten months after it had been obtained. Evidently the blood sample had become misplaced or overlooked and no one knew of its existence until some envelopes were being opened during the process of the trial. On defendant's motion the blood was sent to an expert selected by the defendant for the purpose of analysis, and upon an initial basic screening test, the analysis showed that the blood contained a residue of cocaine. However, upon a more sophisticated analysis of the blood the results indicated that there were no signs of cocaine or its metabolites in the blood.

Defendant for some time suffered from amnesia concerning the events in question but eventually was able to provide his psychiatrist with sufficient information for the psychiatrist to testify that at the time defendant was stabbing Vicki Dunno and Diane Parker, he thought that he was fighting and stabbing his mother who was beating

him with an automobile antenna. The defendant did not testify at trial.

Other evidence relevant to the decision will be discussed below.

II. GUILT OR INNOCENCE PHASE

The first issue in defendant's brief refers to the alleged denial of his constitutional rights by the trial judge's denial of his motion to continue the trial. Defendant's counsel at oral argument before this Court expressly waived this issue, stating that the issue was not one of substance and therefore was being waived.

A.

Defendant contends next that the trial court erred in denying his motion to suppress the evidence of the expert who analyzed defendant's blood for the purpose of determining whether it contained a residue of cocaine. This blood sample had been taken from the defendant shortly

after he was arrested; however, it was not analyzed until during the trial, some nine or ten months after it had been obtained. There is no evidence to indicate, and indeed no contention is made by defendant, that the evidence was willfully concealed in bad faith by the district attorney. All of the evidence indicates that the blood sample was simply overlooked until it was inadvertently discovered during the trial upon the opening of some of the evidence envelopes. On defendant's motion he was allowed to select an expert for the purpose of analyzing the blood sample to determine if cocaine or a residue of cocaine was in the sample. This examination was done by an expert in Salt Lake City who was flown to Charlotte for the purpose of testifying at the trial. A voir dire was held on defendant's motion to suppress the testimony of the witness. Afterwards the court denied defendant's motion

to suppress all of the testimony. The defendant did not object to this ruling, nor did he ask that he be allowed a continuing objection to the questions asked in the presence of the jury. Rather, the defendant made individual objections to the testimony of the witness Peat during his examination. Defendant's counsel lodged some twelve objections during the direct examination of the witness Peat. The court passed upon the various objections as they were made in the presence of the jury. The following questions were asked in the presence of the jury of the witness Michael Peat, the examiner who was qualified as an expert in the field of chemistry and toxicology for the purpose of testifying in this case:

> Q: Now you said the mass spectrometer would determine or show if there were cocaine or its metabolites in the sample that you tested. Is that correct?
>
> A: That is correct.

Q: And in this particular instance of testing this blood sample, what results did you get on the mass spectrometer?

A: We did not detect cocaine or its metabolites in this blood sample.

The defendant did not object to this crucial testimony.

Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error upon appeal. E.g., N.C. Gen. Stat. S 15A-1446(b) (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976). However, in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972), this Court held that where a voir dire was held by the court and thereafter the court ruled that the evidence sought to be excluded was admissible and the defendant excepted to the ruling, it was not necessary for the defendant to renew his objection upon the

presentation of the testimony before the jury, although that would have been the better practice. Here, this principle is inapplicable because the defendant did not lodge an exception to the adverse ruling of the court upon his motion to suppress at the conclusion of the voir dire hearing. Nevertheless, in our discretion we have reviewed the testimony challenged by the defendant and find that it was competent and that the court did not commit error in admitting it.

Michael Peat, the witness, was qualified as an expert in the field of chemistry and toxicology for the purpose of testifying in this trial. He conducted two tests upon the defendant's blood sample which involved the use of accepted scientific procedures--radioimmunoassay, gas chromatography, and mass spectrometry. The witness was qualified to perform the tests in question, they were per-

formed in accordance with scientifically approved procedures, and the procedures used were scientifically reliable. Therefore, the test results were properly admissible into evidence. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974), death sentence vacated, 428 U.S. 903, 49 L.Ed.2d 1207 (1976). Moreover, the initial screening test which was testified to before the jury showed a positive reaction for the presence of cocaine, which was favorable to the defendant. The second test failed to reveal the presence of cocaine or its metabolites in the blood sample. Mr. Peat also testified that once ingested, cocaine and its metabolites are quickly broken down and excreted from the human system. There was also before the jury the testimony of Dr. Peter Jatlow of the Yale Univeristy

School of Medicine, who was a clinical pathologist. He was qualified as an expert in the analysis of blood and urine samples for the presence of various chemicals and has specialized in the study of such drugs as cocaine. He has also done extensive research on the breakdown of cocaine in the bloodstream. Dr. Jatlow's testimony corroborated the defendant's contention that defendant had ingested cocaine at the time in question. We find no prejudicial error in the court's admitting the testimony of the witness Michael Peat.

B.

Defendant next contends that there was not sufficient evidence to support the finding of a felony upon which the jury could base its determination of guilt of felony murder in the first degree. Defendant also contends that the underlying felonies relied upon by the state are

kidnapping and attempted rape and that because they were presented to the jury in the disjunctive, this raises a question of the unanimity of the verdict. The underlying felonies on the felony murder instructions were submitted in the disjuntive; however, a reading of the entire charge shows that Judge Ferrell clearly instructed the jury that its verdict must be unanimous as to every essential element of the offenses charged. Early in its instructions the the court charged the jury that "your answers must be unanimous as to each issue and sub-part thereof which you shall come to consider." Later in his instructions, after his final mandate, Judge Ferrell charged:

> Again, I remind you that each of these charges and any lesser-included offense about which I have instructed you is a separate charge and you should consider them at all times as separate in your deliberations.
>
> Finally, as to any verdict which you reach

> in each charge, your verdict, to be a verdict, must be unanimous.

There can be no question but that the jury fully understood that its verdict must be unanimous as to each element of the offenses which were submitted to it.

We conclude that the law as stated by Justice Carlton in State v. Jordan, 305 N.C. 274, 279, 287 S.E.2d 827, 830-31 (1982), is equally applicable to the facts of this case:

> Defendant also alleges error in the trial court's instructions on first degree burglary. He contends that by instructing the jury that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering, the trial court denied defendant his constitutional right to a unanimous jury verdict.
>
> The North Carolina Constitution guarantees a criminal defendant the right to a unanimous verdict. N.C. Const. art. I, § 24; accord, State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975). To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368

(1970). Defendant contends that the use of the disjuntive in describing the requisite intent for burglary created the possibility that less than all the jurors could agree which felony the defendant intended to commit although they might all agree that defendant did have the intent to commit one of the felonies and convict him of burglary.

While defendant's argument is not unreasonable, we are not persuaded. The trial court repeatedly instructed the jury that its verdict must be unanimous. When the charge is read as a whole, as it must be, it is obvious that the trial court conveyed to the jury that the verdicts must be unanimous as to every essential element and that the instruction containing the disjunctive was a shorthand statement that the jurors must all find that defendant had the intent to commit rape or that they must all agree that defendant had the intent to commit a first degree sexual offense. While defendant is correct as to the technical meaning of the instruction, this Court must neither forget nor discount the common sense and understanding of the trial court and the jurors. From our examination of the charge we are satisifed that defendant was not deprived of his constitutional right to a unanimous jury verdict.

We find no prejudicial error in the court's instructions to the jury.

Turning now to defendant's contention as to the insufficiency of the evidence, we find

plenary evidence in the record to sustain both the charge of kidnapping Diane Parker and the charge of attempting to commit rape upon Diane Parker. Diane Parker was found on her back with her legs spread wide, her feet nearly up to her buttocks, knees raised and apart, and her nightgown drawn up to her upper chest, exposing her left breast. Many of the wounds were inflicted upon Diane Parker while she was in a prone position. An examination of Diane's nightgown indicated that it had been pulled up before some of the stab wounds were inflicted. When defendant crawled out of the bushes near Diane Parker's body, he had blood smeared upon his shirt and pants consistent with the blood type of Diane Parker. These facts support a reasonable inference that McDougall caught Diane Parker in the yard, knocked or threw her to the ground on her back, pulled her nightgown up over her chest, and parted her legs in an effort to rape her.

She resisted and fought back, and McDougall stabbed her to death. The evidence is sufficient to survive a motion for nonsuit on the theory of murder during an attempted rape. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

Moreover, the evidence is amply sufficient to find the defendant guilty of kidnapping Diane Parker and thus to support a verdict of guilty of murder in the first degree upon that felony. N.C.G.S. 15A-39(a)(3) states that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

The evidence is clear that there was a removal and restraint of Diane Parker which was more than an inherent inevitable part of the commission of the murder. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981). The evidence shows that once McDougall grabbed the butcher knife in Diane and Vicki's kitchen, he continuously confined, removed, or restrained the two women until he crawled into the bushes after stabbing Diane to death. Clearly defendant removed Diane from her home at knife point and dragged her to an automobile in the driveway. There defendant stated that he intended to put her and Vicki in the trunk of the car and drive them to some undisclosed place. This removal was not inherent in the felony of murder or attempted rape. It was more than a technical asportation inherent in the commission of another felony. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503,

243 S.E.2d 338 (1978). When Vicki threw her car keys to the ground, defendant threw her to the ground and began stabbing her. The two women were terrorized. Defendant prevented Diane from escaping from his control by catching her as she began to run across the yard. Whereas Vicki managed to lock herself in her house and call for help, Diane never escaped from her kidnapper. After he caught Diane, defendant stabbed her until she bled to death. The evidence thus supports a jury's finding that defendant was guilty of the felony of kidnapping Diane and that he murdered her in the perpetration of this felony.

While it is true that the jury found McDougall not guilty of the offense of kidnapping Vicki Dunno, this does not invalidate the finding that McDougall was guilty of kidnapping Diane Parker. Consistency of verdicts is not a necessity. A verdict of guilty on one count

and not guilty on the other when the same act results in both offenses will not be disturbed. State v. Davis, 214 N.C. 787, 1 S.E.2d 104 (1938); State v. Rosser, 54 N.C.App. 660, 284 S.E.2d 130 (1981); 4 Strong's N.C. Index 3d Criminal Law § 124.5 (1976). The verdict of kidnapping Diane Parker was fully supported by the evidence and supports the verdict of guilty with respect to felony murder. We find no prejudicial error in the determination of the guilt of defendant of murder in the first degree.

III. SENTENCING HEARING

During the sentencing hearing the state proposed to offer evidence of a previous conviction of defendant for a felony involving the use or threat of violence. N.C. Gen. Stat. § 15 A-2000(e)(3) (Cum. Supp. 1981). The prior conviction was on a charge of rape in the state of Georgia in 1974. Defendant opposed the use

of the 1974 rape conviction and first argued that it was not a final conviction because defendant had filed a petition for writ of habeas corpus moving that the conviction be set aside. This petition was filed during the current trial. It was only after this motion to suppress the use of the Georgia rape conviction was denied that defendant stipulated the certified record of the conviction could be introduced. Defendant, however, never stipulated that the Georgia rape conviction involved the use or threatened use of violence to the person.

The state further offered the testimony of Mary Huff, the victim in the Georgia rape case, for the purpose of showing that the crime involved the use or threat of violence. After extensive argument, the court allowed this witness to testify. May Huff testified that in 1973 she lived next door to defendant's sister and that prior to her rape she had seen

defendant but had never talked to him. About 4:00 a.m. on 21 November 1973, she wakened, turned on her light, and saw defendant standing in her bedroom doorway. She ordered defendant to leave and began to telephone the police when he refused. Defendant pulled out a butcher knife, held it to her face, and threatened to kill her and her child unless she removed her nightgown. She complied, and defendant raped her upon her bed. Defendant threatened to kill her if she told his sister about the rape. After defendant left, Ms. Huff called the police. This testimony occupies seven pages of the transcript. Defendant cross-examined Mary Huff extensively, for eighteen pages of the transcript. Defendant attacked the credibility of the witness Huff and established that he was eighteen years of age at the time of the rape and had entered a plea of guilty to the charge.

During the sentencing hearing defendant also produced evidence from several expert witnesses concerning his emotional, mental, and psychological condition. McDougall testified in his own behalf, relating many experiences he had as a child, particularly those concerning his being beaten by his mother with pots, pans, golf clubs, and a car antenna. His grandfather committed suicide in McDougall's presence by shooting himself with a shotgun. McDougall's father was killed as the victim of an armed robbery.

McDougall testified that between dusk and midnight or one o'clock in the morning on the night of the crimes, he and a friend injected six grams of cocaine. He said his vision was fuzzy and he couldn't focus well as he drove home in the early morning hours. He parked outside his home in Blueberry Lane, but he didn't want to go inside because his arms were bleeding from the needle marks and he feared an

argument with his wife. He decided to ask his neighbors for alcohol to clean his arms.

McDougall knocked on the door of the victim's house, said that he was "Lynda's husband from next door," and asked for alcohol. When Diane Parker asked if he wanted her to call a doctor, he said he didn't know why but he said yes. Someone opened the door and he went inside, where Diane Parker picked up the phone to call. At that point McDougall said he "lost everything," "could no longer think," and was "very, very scared." He picked up a knife he saw, grabbed the phone, and asked for car keys. He said the next thing he knew he was outside, and when he looked at Diane Parker, he saw his mother, who was hitting him with a car antenna. He said something happened inside him like an explosion in his chest, and he jumped at her and stabbed her. He saw her running, chased her, pulled her down, and

started stabbing her again. He did that for a long time until he felt "the thing that had been inside" of him leaving. He stopped, sat on his knees, and couldn't hear or focus. He wanted to get away, but his legs wouldn't work, so he crawled under some nearby bushes. The next thing he knew there were many people around, including policemen. He thought they were after him for drugs so he came out and said, "I give up." The police questioned him about a woman who was dead, but he didn't remember what had happened and didn't believe them.

The jury found the following aggravating circumstances:

1. The defendant had previously been convicted of a felony involving the use of violence to the person. N.C. Gen. Stat. §§ 15a-2000(e)(3) (Cum. Supp. 1981).

2. The murder was especially henious, atrocious, or cruel. N.C. Gen. Stat. § 15A-2000(e)(9).

3. The murder was part of a course of conduct by the defendant which included the commission by defendant of another crime of violence against another person. N.C. Gen. Stat. § 15A-2000(e)(11).

The jury found the following mitigating circumstances:

1. The murder was committed while defendant was under the influence of mental or emotional disturbance. N.C. Gen. Stat. § 15A-2000(f)(2).

2. Defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of the law was impaired. N.C. Gen. Stat. § 15A-2000(f)(6).

3. There are other circumstances arising from the evidence that have mitigating value.

N.C. Gen. Stat. § 15A-2000(f)(9).

The jury then answered the following issues:

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

ANSWER: Yes.

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Whereupon the jury recommended that defendant be sentenced to death, which sentence the court imposed.

A.

Defendant first argues that by allowing Mary Huff to testify during the sentencing hearing the trial court committed prejudicial error. During the hearing the state sought to

elicit testimony from Ms. Huff relevant to the following aggravating circumstance:

> The defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C. Gen. Stat. § 15A-2000(e)(3) (Cum. Supp. 1981).

Defendant had been previously convicted of feloniously raping Ms. Huff and feloniously burglarizing her home. Before Ms. Huff took the stand, the state contended at the bench that the facts of these prior convictions showed that each was a felony involving the use or threat of violence to the person. Defendant responded by arguing that under N.C.G.S. 15A-2000(e)(3) the phrase "felony involving the use or threat of violence to the person" must be limited to a felony in which the use or threat of violence to the person was an element of the offense. Defendant contended that a prior

felony conviction cannot be used as an aggravating circumstance unless the use or threat of violence to the person is an element of the offense, even though the facts show that the commission of the offense did involve the use or threat of violence to the person. Because the use or threat of violence to the person was not an element of the offense of burglary, the defendant argued that burglary is not a felony within the meaning of N.C.G.S. 51A-2000 (e)(3). Therefore, defendant argued, evidence of the burglary was not admissible during the sentencing hearing for the purpose of establishing the aggravating circumstance listed in N.C.G.S. 15A-2000(e)(3).

The trial court resolved this question in favor of defendant. Although the state did not except to this ruling, we have examined the issue in our discretion because it is likely to arise again. We find the trial court's

ruling to have been erroneous. The statute does not state that the jury may only consider as an aggravating circumstance those felonies in which the use or threat of violence to the person is an element of the offense. The statute contains the word "involving," which indicates an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element. Crimes that do not have violence as an element may be committed by the use or threat of violence. By using "involving" instead of language delimiting consideration to the narrow class of felonies in which violence is an element of the offense, we find the legislature intended the prior felony in N.C.G.S. 15A-2000(e)(3) to include any felony whose commission involved the use or threat of violence to the person. Thus we hold that for purposes of N.C.G.S. 15A-2000 (e)(3), a prior felony can be either one which has

as an element the involvement of the use or threat of violence to the person, such as rape or armed robberty, State v. Hamlette, 303 N.C. 490, 276 S.E.2d 338 (1981), or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.[1]

---

1. For example, a defendant could commit armed robbery, yet, for reasons satisfactory to the district attorney, only be charged with felonious larceny. A conviction of the larceny charge could be an aggravating circumstance if the state at the sentencing hearing proved that its commission involved the use or threatened use of violence to the person. The testimony of witnesses would be proper to prove or rebut the involvement of violence. Likewise, a defendant could be convicted of rape in the second degree by engaging in vaginal intercourse with a victim who is mentally defective. N.C. Gen. Stat. § 14-27.3 (a) (2)(1981). Violence is not an element of the offense. If the use or threat of violence to the person was involved, this could be shown by witnesses to establish the conviction as an aggravating circumstance. Forgery, N.C.G.S. 14-119 (1981), a nonviolent crime, may be committed by a defendant who forces

Defendant's objection before this Court concerns Mary Huff's testimony regarding defendant's prior conviction for raping her. We note that rape is a felony which has as an element the "use or threat of violence to the person." N.C. G.S. 14-27.2 reads in part as follows:

> § 14-27.2. First-degree rape.
>
> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon . . ..

Defendant was convicted of raping Ms. Huff in Georgia, where the same general principle applies: "A person commits the offenses of rape when he has carnal knowledge of a female forcibly and against her will. . . ." Ga. Code Ann.

---

another at gunpoint to forge a signature on a check.

§ 16-6-1(a)(1982).

Defendant stipulated to the admissibility of the certified record of his prior conviction of the felony of rape. When the state sought to introduce testimony of Ms. Huff concerning the rape, defendant objected on grounds that his stipulation foreclosed the state from offering testimony to establish the prior conviction and the fact that it involved the use or threat of violence to her person.[2] The trial court ruled that Ms. Huff could testify during the sentencing hearing concerning the prior rape. When she took the stand, she stated that McDougall had raped her at knife point, threatening to kill her and her young daughter.

---

2. Although defendant argued that the felony of rape in Georgia involved the use or threat of violence as a matter of law, he did not so stipulate with respect to this prior conviction.

Defendant states that as a result of allowing the testimony of Mary Huff concerning the prior rape conviction, the sentencing hearing turned into a "mini-trial" of the prior offense.[3] He relies upon State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981). At the outset we note that this case was tried at the 9 June 1980 session of superior court in Mecklenburg County and that Silhan was not decided until 4 March 1981. Therefore Judge Ferrell did not have the benefit of Silhan. Moreover we do not find that Silhan supports defendant's argument. In Silhan, we find:

> We note in this regard that the most appropriate way to show the "prior felony"

---

3. If this aspect of the hearing did become a "raucous mini-trial," it was due largely to the efforts of defendant's counsel, Jerry Paul, during his free-swinging, wide-ranging cross-examination of Ms. Huff. Defendant cannot be heard now to complain about the results of his own overzealous actions.

> aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person. There should be no "mini-Trial" at the sentencing hearing on the questions of whether the prior felony occurred, the circumstances and details surrounding it, and who was the perpetrator. Whether a defendant has, in fact, been convicted of a prior felony involving the use or threat of violence to a person would seem to be a fact which ordinarily is beyond dispute. It should be a matter of public record. If, of course, defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the state should be permitted to offer such evidence as it has to overcome defendant's denials.

302 N.C. at 272, 275 S.E.2d at 484 (emphasis added).

The above statement by this Court in Silhan may properly be referred to as obiter dictum. In State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) (decided eight months after Silhan), this

Court was faced directly with the question whether the state could introduce evidence concerning a prior murder when the defendant had stipulated that he had been found guilty of the charge. This Court found no error in allowing such testimony.

> The objection made by defendant is that, as he had stipulated the fact of his prior conviction, the State should not have been allowed to introduce testimony concerning the murder. The State argues that when proving as an aggravating circumstance that defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to the person (G.S. 15A-2000(e)(2) and (3), the State should not be limited to admission of the court record of conviction.
>
> We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Supreme Court of Florida addressed the same question. There, as here, appellant's counsel stipulated to the admissibility of a prior conviction of defendant for murder. At the sentencing hearing, the widow of the victim was nonetheless allowed to testify in detail about events surrounding the crime. In deeming the tesimony properly admitted, the court said:

> This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. (Citation omitted).

Id. at 1001.

304 N.C. at 279-80, 283 S.E.2d at 780-81.[4]

---

4. Although Justice Exum, the author of Silhan, dissented in part in Taylor, he did not dissent from this holding of the Court.

In Taylor the prior felony, murder, involved violence as an element of the offense. The holding in Taylor is in accord with the general rule that every circumstance calculated to throw light upon the alleged crime is admissible. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968); State v. Hamilton, 264 N.C. 277, 141 S.E.2d 506 (1965), cert. denied, 384 U.S. 1020 (1966).

The trial judge has ample authority to control the state's presentation of evidence in proving that the prior felony involved the use or threat of violence to the person. It is the duty of the trial judge to supervise and control the trial to prevent injustice to either party. Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960). The court has the power and duty to control the examination and cross examination of the witnesses. State v. Arnold, 284 N.C. 41,

199 S.E.2d 423 (1973); Greer, supra. The trial judge may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980); State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874 (1973). The extent of cross-examination with respect to collateral matters is largely within the discretion of the trial judge. State v. McLean, 294 N.C. 623, 242 S.E.2d 814 (1978); Ingle v. Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967). The proper exercise of this authority will prevent the determination of this aggravating circumstance from becoming a "mini-trial" of the previous charge.

Defendant here argues that the state should be limited to introducing the authenticated record of the conviction to prove a prior felony

involving the use or threat of violence to the person. Only if defendant then challenges the involvement of the use or threat of violence to the person with respect to the offense would the state be allowed to rebut this contention by the use of witnesses. This argument overlooks the state's duty to prove each aggravating circumstance beyond a reasonable doubt. N.C. Gen. Stat. § 15A-2000(c)(1) (Cum. Supp. 1981). Although the introduction of the record of the prior conviction establishes a prima facie case where the prior felony has the use or threat of violence as an element and could support a peremptory instruction, it is not conclusive upon the jury. Where violence is not an element of the felonious offense, the introduction of the record of conviction would not create a prima facie case. In either event, the state cannot be deprived of an opportunity to carry its burden of proof by the use of competent, relevant evidence.

We find the rule in Taylor to be dispositive with respect to this question, and we hold that the involvment of the use or threat of violence to the person in the commission of the prior felony may be proven or rebutted by the testimony of witnesses and that the state may initiate the introduction of this evidence notwithstanding defendant's stipulation of the record of conviction.

This ruling is consistent with the opinions of the United States Supreme Court. In Lockett v. Ohio, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), we find:

> And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant--if not essential--[to the] selection of an appropriate sentence . . . ." Williams v. New York, supra [337 U.S.], at 247 [93 L.Ed. 1337, 69 S. Ct. 1079] (emphasis added).

Id. at 602-03, 57 L.Ed.2d at 988-89.

> The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S., at 304 [49 L.Ed.2d 944, 96 S.Ct. 2978] in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case."

Id. at 601, 57 L.Ed.2d at 988 (citations omitted).

> "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Id. at 604, 57 L.Ed.2d at 989 (quoting Woodson v. North Carolina, 428 U.S. at 304, 49 L.Ed.2d at 961).

While Lockett dealt with an Ohio statute that limited the mitigating circumstances

available to a defendant, its reasoning applies equally to the prosecution. In order to prevent an arbitrary or erratic imposition of the death penalty, the state must be allowed to present, by competent relevant evidence, any aspect of a defendant's character or record and any of the circumstances of the offense that will substantially support the imposition of the death penalty. N.C. Gen. Stat. § 15A-2000(b)(3) (Cum. Supp. 1981).

The assignment of error is without merit.

B.

Defendant next argues that the trial court erred in failing to submit to the jury in writing all possible mitigating circumstances on the verdict sheet. We reject this argument and find no prejudicial error in this regard.

This Court in State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982), outlined the instructive

guidelines established by this Court for the trial judges of our state to follow in the submission of mitigating circumstances. We commend them to the bench and bar. Defendant's assignment of error is governed by the rules in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). There it was held that if "a defendant makes a timely request for a listing in writing of possible mitigating circumstances . . .the trial judge must put such circumstances on the written list." Id. at 72, 257 S.E.2d at 617 (emphasis added). Absent a request to include possible mitigating circumstances on the written verdict form, the failure of the trial judge to so do is not error. Id.

Here defendant moved that the court submit to the jury three statutory mitigating circumstances, N.C.G.S. 15A-2000(f), and twelve additional mitigating circumstances, N.C.G.S.

15A-2000(f)(9). The court placed the three statutory circumstances on the verdict sheet. The additional circumstances were not placed on the verdict sheet. However, the following question was submitted to the jury on the verdict sheet: "Is there any other circumstance or circumstances arising from the evidence which you deem to have mitigating value?" The judge charged the jury on ten of the twelve mitigating circumstances requested under N.C.G.S. 15A-2000(f)(9). The jury answered this issue "yes."

Defendant failed to request, as required by Johnson, that the mitigating circumstances be listed on the written verdict form. The fact that the trial judge in his discretion listed the statutory mitigating circumstances on the verdict form does not make it error for him to fail to list the additional circumstances. See also State v. Rook, 304 N.C.

201, 283 S.E.2d 732 (1981), cert. denied, ___U.S.___, 72 L.Ed.2d 155 (1982) (there are no statutory or constitutional requirements of specific findings on the mitigating circumstances submitted to the jury).

We again repeat that it would be the better practice to include on the verdict form all mitigating circumstances that are to be submitted to the jury. Id. In so doing, however, the trial court must also submit the question of whether there exists "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C. Gen. Stat. § 15 A-2000(f)(9) (Cum. Supp. 1981). Otherwise, jurors may feel they are prohibited from considering additional mitigating circumstances not listed on the verdict sheet. Failure to submit this question could violate the constitutional principles enunciated in Lockett v. Ohio, supra, 438 U.S. 586, 57

L.Ed.2d 973 (1978).

In addressing this assignment of error, defendant urges that the trial court erred in the following instruction: "The law of North Carolina specifies the mitigating circumstances which might be considered by you, and only those circumstances created by statute, about which I shall instruct you, may be considered by you."

Standing alone this instruction is arguably erroneous unless the phrase "only those circumstances created by statute" is interpreted to include mitigating circumstances arising under N.C.G.S. 15A-2000 (f)(9). Certainly this is a logical interpretation of the phrase, and we adopt it. Moreover, when we examine the court's charge in its entirety, as we are required to do, no error appears. State v. Silhan, supra, 302 N.C. 223,

275 S.E.2d 450 (1981); State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901 (1970); State v. Hall, 267 N.C. 90, 147 S.E.2d 548 (1966). The court, after giving the quoted instruction, specifically charged the jury as to each mitigating circumstance relied upon by defendant. This included three mitigating circumstances specifically listed in the statute and ten circumstances under N.C.G.S. 15A-2000(f)(9). In this respect the court charged:

> [Y]ou may consider any circumstances from the evidence which you are satisfied lessens the seriousness of the murder or suggests a lesser penalty than otherwise may be required, such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value.... [The judge listed ten mitigating circumstances.]
>
> So then, if you find from the evidence any one or more of the mitigating circumstances specifically enumerated in the preceding paragraph or any other mitigating circumstance arising from the evidence which you deem to have mitigating value, then it would

> be your duty to answer this sub-part (d) "Yes." Otherwise, "No."
>
> So then, Members of the Jury, as to this second issue I instruct you that if you find one or more of the mitigating circumstances from the evidence, it would be your duty to answer the issue "Yes," . . .

The trial court repeatedly instructed that the jury could find any mitigating circumstance supported by the evidence. We find no prejudicial error in the challenge instruction.

C.

Defendant argues that the trial court erred in charging that if the jury found that: (1) one or more aggravating circumstances existed, and (2) that mitigating circumstances found by it were insufficient to outweigh the aggravating circumstances, and (3) the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, it had a duty to recommend a sentence of execution. Defendant contends that even

though the jury answers the issues in the manner required in order to impose the death sentence, it could still exercise its discretion and recommend a sentence of life imprisonment. This question has been resolved by this Court contrary to defendant's contention in State v. Pinch, supra, 306 N.C. 1, 292 S.E.2d 203, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982); and State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982). Defendant requests us to reconsider these holdings. We decline to do so and reaffirm these decisions with respect to this issue. This assignment of error is meritless.

D.

Defendant argues that the form of and instructions on the fourth issue submitted to the

jury were erroneous. The issue reads:

> 4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?
>
> ANSWER: Yes.

This issue involves the requirement that in making the ultimate decision between life and death, the jury must consider any aggravating circumstances found along with any mitigating circumstances. The totality of the mitigating and aggravating circumstances must be considered by the jury in arriving at this decision. We review the court's instructions in their entirety in addressing this issue.

The court instructed the jury inter alia:

> It is now your duty to recommend to the Court whether the defendant will be sentenced to death or life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death.
>
> . . . . .

A mitigating circumstance is that circumstance arising from the evidence which does not constitute a justification or excuse for a killing, or which reduces it to a lesser degree of crime than first-degree murder, but which nevertheless may be considered as extenuating or reducing the moral culpability of the killing, or which makes it less deserving of extreme punishment than other first-degree murders. . . . .

The defendant has the burden of persuading you of the existence of any mitigating circumstance. The defendant must satisfy you from the evidence taken as a whole, not beyond a reasonable doubt, but merely to your satisfaction, of the existence of any mitigating circumstance.

. . . . . .

[Y]ou may consider any circumstance from the evidence which you are satisfied lessens the seriousness of the murder or suggests a lesser penalty than otherwise may be required, such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value. . . .

. . . . .

So then, if you find from the evidence any one or more of the mitigating circumstances specifically enumerated in the preceding paragraph or any other mitigating

circumstance arising from the evidence which you deem to have mitigating value, then it would be your duty to answer this sub-part (d) "Yes." Otherwise, "No."

So then, Members of the Jury, as to this second issue I instruct you that if you find one or more of the mitigating circumstances from the evidence, it would be your duty to answer the issue "Yes". . . .

. . . . .

The third issue for your consideration reads as follows:

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

On this issue the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to outweigh any aggravating circumstances you may have found.

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. Your weighing should not consist of merely

adding up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the aggravating circumstances outweigh the mitigating circumstances.

So then, Members of the Jury, if the State has proven to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to--that is, do not--outweigh the aggravating circumstances you find, it would then be your duty to answer this third issue "Yes." However, if you do not so find, or if you have a reasonable doubt, then it would be your duty to answer this issue "No."

. . . . .

On this [Fourth] issue the burden is on the State to prove to you from the evidence beyond a reasonable doubt that the aggravating circumstances found, if any, are sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable

doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer "Yes," you must agree unanimously that they are.

If you unanimously find beyond a reasonable doubt that any aggravating circumstance or circumstances found by you are sufficiently substantial to call for the death penalty, you would answer this issue "Yes." If you do not so find, or have a reasonable doubt, then you would answer this issue "No."

If you answer this issue "No," it would be your duty to recommend that the defendant be imprisoned for life.

So then, Members of the Jury, finally I instruct you for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt, as I have defined that term, from the evidence:

FIRST, that one or more statutory aggravating circumstances existed; and,

SECOND, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances, if any, found by you; and,

THIRD, that the aggravating circumstances, if any, found by you are sufficiently substantial to call for the imposition of the death penalty.

. . . .

. . . If the State has proven these three things to you beyond a reasonable doubt, and you unanimously so find, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find, or if you have a reasonable doubt to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

Defendant contends that the form of the issue and the jury instructions allowed the jury to answer the issue "yes" without any consideration of the mitigating circumstances found by the jury.

The issues submitted are based upon the following portions of the statute:

> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances

found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

. . . .

(c) Findings in Support of Sentence of Death. When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C. Gen. Stat. §§ 15 A-2000(b), (c) (Cum. Supp. 1981).

The fourth issue is not an isolated, independent question that may be answered without reference to the other issues and circumstances

of the case. This is manifested by the language of the General Assembly--"[b]ased on these considerations" should the defendant be sentenced to death or life imprisonment. N.C. Gen. Stat. § 15A-2000(b) (3)(Cum. Supp. 1981). In deciding the fourth issue, the jury must consider the aggravating circumstances found, the mitigating circumstances found, and the degree to which the aggravating circumstances outweigh the mitigating circumstances. The jury must compare the totality of the aggravating circumstances with the totality of the mitigating circumstances and be satisfied beyond a reasonable doubt that the statutory aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty and that the death penalty is justified and appropriate.

When the charge is considered contextually, as we have done, no prejudicial error appears. State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901

(1970). Although not a model charge, the jury was adequately instructed that before recommending the death sentence it must be satisfied that the sentence is justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances found by the jury. The charge and the sentencing procedure satisfied the requirements of N.C.G.S. 15A-2000 and the holding in Lockett v. Ohio, supra, 438 U.S. 586, 57 L.Ed.2d 973 (1978), that the death penalty should not be imposed where the sentencer may be prevented from considering all mitigating circumstances in making the ultimate life or death determination.

The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and then look to the remainder to determine if that value is sufficiently substantial to deserve the death penalty. We reject and disapprove such a

mechancial mathematical approach to the decision of life or death.

The instructions given in this case are substantially the same as those approved by this Court in State v. Brown, 306 N.C. 151, 293 S.E. 2d 569, cert. denied, ___U.S.___, 74 L.Ed.2d 642 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982); State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, ___U.S.___, 74 L.Ed. 2d 622 (1982); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, ___U.S.___, 72 L.Ed.2d 155 (1982); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert.denied, 454 U.S. 957, 70 L.Ed.2d 240 (1981); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 65 L.Ed.2d 1137 (1980).

As stated earlier, although the instructions are free from prejudicial error, they are not a model charge. The form of the fourth issue can

also be more appropriately framed. We therefore urge the bench and bar to carefully consider the following with respect to this question.

We note that the order and form of the issues in capital trials have varied from case to case. The order and form of the issues to be submitted to the jury should be substantially as follows:

(1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

(2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?

(3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?

(4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

With respect to the fourth issue we find the following statement by the Utah Supreme Court in State v. Wood, 648 P.2d 71, 83 (Utah), cert. denied, ___U.S.___, 74 L.Ed.2d 383 (1982), quoted by the United States Supreme Court in Smith v. North Carolina, ___U.S.___, 74 L.Ed.2d 622 (1982), to be instructive:

> It is our conclusion that the appropriate standard to be followed by the sentencing authority--judge or jury--in a capital case is the following:
>
> "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."
>
> These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors, not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the

aggravating factors. The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

The sentencing procedure in each capital case must assure reliability in the decision that death is the proper punishment. Lockett v. Ohio, supra, 438 U.S. 586, 57 L.Ed.2d 973 (1978). Appropriate instructions on the fourth issue should be given to the jury substantially as follows:

"In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the

death penalty is justified and appropriate in this case before you can answer the issue 'yes.' In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. The jury may very properly emphasize one circumstance more than another in a particular case.[5] You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine

---

5. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Davis, 58 N.C.App. 330, 293 S.E.2d 658, disc. rev. denied, 306 N.C. 745 (1982).

how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you.[6] After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue 'yes.' If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue

---

6. Smith v. North Carolina, ___U.S.___, 74 L.Ed.2d 622 (1982).

'no.'" [7]

Bench and bar should note that the foregoing is not intended to be a complete charge on this issue.[8]

We find no prejudicial error in the sentencing phase of defendant's trial.

IV.

Finally, we turn to the duties required of this Court in every capital case in which a sentence of death has been imposed. We are directed by N.C.G.S. 15A-2000(d)(2), (Cum. Supp.

---

7. Cf. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, ___U.S.___, 74 L.Ed.2d 622 (1982).

8. In the event the jury fails to find the existence of any mitigating circumstances, the jury must still answer the fourth issue. In such case, the jury must determine whether the aggravating circumstances found by the jury are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are enuous, flimsy, abstract, imaginary, deceptive, or negligible.

1981) to determine:

> (1) Whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death;
>
> (2) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have thoroughly reviewed the transcript, record on appeal, briefs of the defendant and the State, as well as the recorded oral arguments of counsel before this Court. After so doing, we find that the record fully supports the aggravating circumstances found by the jury. We hold that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. There is no indication in the transcript or record that any impermissible factor influenced the imposition of the death sentence.

We must next determine whether the sentence in this case is excessive or disproportionate to the penalty imposed in similar cases. In our opinion in State v. Douglas Williams, Jr., (No. 277A82, Edgecombe County, filed 5 April 1983), this Court set forth the pool of cases to be considered in proportionality review of sentences in capital cases. Williams also states the method of such review. The pool of cases for a proportionality review is composed of all capital cases tried after the effective date of our capital punishment statute, 1 June 1977, in which there were convictions of murder in the first degree, regardless of the sentences imposed, and which have been reviewed on appeal by this Court. In making this review, this Court will rely upon its own case reports of the pool of cases, together with the transcript, record and briefs when necessary. See, Williams, supra.

Upon review of the transcript, record, briefs and recorded oral arguments, we do not find the death sentence in this case disproportionate when compared with the pool of similar cases. In carrying out his review we have considered both the crime and the defendant. N.C. Gen. Stat. § 15A-2000(d)(2), (Cum. Supp. 1981). In so doing, we have complied with the constitutional requirement that individualized consideration be given to the defendant before the death sentence can be upheld. Lockett v. Ohio, supra, 438 U.S. 586, 57 L.Ed.2d 973 (1978). In considering the defendant, we note that the jury found as statutory mitigating circumstances that defendant was under the influence of mental or emotional disturbance when he committed the murder, and that the defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired.

N.C. Gen. Stat. § 15A-2000(f)(2)and (6). While these findings are often persuasive on the jury in recommending life imprisonment,[9] they are not conclusive.[10] It is also apparent from the transcript and record that, although there is evidence to the contrary, these mitigating circumstances may have resulted from the defendant's voluntary injections of cocaine. The trial court instructed the jury that defendant could be under

---

9. See State v. Adcox, 303 N.C. 133, 277 S.E.2d 398 (1981); State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980); State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979); State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979); State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

10. State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, ___U.S.___, 72 L.Ed.2d 155 (1982); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

a mental or emotional disturbance as a result of the "consumption of drugs." Likewise, with respect to impaired capacity, the jury was instructed that this condition could be caused by "drug intoxication." In this case, although finding the existence of these two mitigating circumstances, the jury could have reasonably given them less weight in making the ultimate decision of life or death than did the juries in the cases cited in footnote 9.

The jury found the existence of three aggravating circumstances: defendant had been previously convicted of a felony involving the use of violence to the person, the murder was especially heinous, atrocious or cruel, and the murder was part of a course of conduct which included a crime of violence by defendant against another person, Vicki Dunno. N.C. Gen. State. § 15A-2000(e)(3), (9) and (11), (Cum. Supp. 1981). Two of these aggravating circum-

stances could not have been caused or influenced in any way by defendant's emotional state or diminished capacity. The transcript and record do not support the theory that this murder was the product of defendant's unfortunate childhood or a deficient personality exacerbated by the voluntary injection of cocaine.

After voluntarily injecting cocaine, defendant gained entry into the home of Diane Parker and Vicki Dunno by cunning, guile and misrepresentation. Once in their home, he commenced a campaign of terror against the two young women, cutting, stabbing and slashing them with a butcher knife. There is no reason to repeat here the gory details of the crime.

No duty of this Court is more serious or important than the review of a sentence of death. With this in mind, our careful comparison of this crime and this defendant with similar cases leads us to the conclusion that the death sentence

imposed upon this defendant is not disproportionate or excessive. We find nothing in our review that would justify treating this defendant differently from those defendants who were given death sentences which this Court has upheld since 1 June 1977. Nor does our review of the life sentence cases in the pool of similar cases lead us to the conclusion that defendant should receive a life sentence. Our review discloses a meaningful basis for distinguishing this case from those in which life sentences were imposed. Lockett v. Ohio, supra, 438 U.S. 586, 57 L.Ed.2d 973 (1978); Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert. granted, 43 C.C.H. S. Ct. Bull. B1442 (21 March 1983). We do not find the death sentence in this case to be inappropriate as a matter of law. We decline to exercise our discretion to set aside the death sentence imposed.

Defendant was also convicted of assault on

Vicki Dunno with a deadly weapon with intent to kill inflicting serious injury, and kidnapping of Diane Parker. Although he gave notice of appeal of these convictions, defendant does not bring forward any assignments of error or make any argument with respect to these charges in his brief. We find no error in these convictions.

The result is:

No. 79CRS47734--assault with a deadly weapon with intent to kill inflicting serious injury--NO ERROR.

No. 79CRS67081--kidnapping--NO ERROR.

No. 79CRS47697--murder in the first degree--NO ERROR in guilt determination; NO ERROR in the sentencing phase.

Justice Frye took no part in the consideration or decision in this case.

Justice Exum dissenting as to sentence.

I concur fully in the majority's treatment of the guilt phase of this case. With respect to the sentencing phase I dissent and vote to remand for a new sentencing hearing.

A.

In my view the trial court failed to exercise sufficient control over the direct examination and cross-examination of the witness Mary Huff so that her testimony resulted in a "mini-trial" of the Georgia rape case, a phenomenon which we sought to warn against in State v. Silhan, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), and which the majority today agrees should not be allowed to occur. The primary danger of the mini-trial is that it distracts the jury from its appointed task of determining whether defen-

dant will live or die by focusing too much of its attention on the question of defendant's guilt or degree of culpability in some prior crime. If permitted, the practice could also greatly extend the time required for sentencing hearings to unreasonable lengths as each prior conviction of defendant is, in turn, relitigated.

In Silhan the state at the sentencing hearing offered testimony tending to show that defendant had been convicted in another county for various crimes involving violence. The aggravating circumstance defined by G.S. 15A-2000(e)(3), that "defendant had been previously convicted of a felony involving the use of threat of violence to the person," was not submitted to the jury. Apparently, as we concluded in Silhan, the state offered this testimony to rebut defendant's contention that he had no significant prior criminal history. In ordering

a new sentencing hearing for other reasons, we noted in Silhan that the state would be able to use these other convictions to prove the subsection (e)(3) aggravating circumstance. With concern about the state's use of witnesses to prove the prior convictions and in order to guard against this practice except where necessary, we said in an effort to guide the trial court at the new sentencing hearing:

> We note in this regard that the most appropriate way to show the 'prior felony' aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person. There should be no 'mini-Trial' at the sentencing hearing on the questions of whether the prior felony occurred, the circumstances and details surrounding it, and who was the perpetrator. Whether a defendant has, in fact, been convicted of a prior felony involving the use or threat of violence to a person would seem to be a fact which ordinarily is beyond dispute. It should be a matter of public record. If, of course, defendant denies that he was the

> defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the state should be permitted to offer such evidence as it has to overcome defendant's denials.

302 N.C. at 272, 275 S.E.2d at 484 (emphasis supplied).

I strongly disagree with the majority that this language in Silhan "may properly be referred to as obiter dictum." It is no more dictum than the majority's present instruction to the trial court with regard to the proper form and instructions on what it refers to as the "fourth issue" in a capital sentencing proceeding. Indeed, the majority relies on the italicized portions of the above Silhan passage to sustain its decision here. Furthermore, the majority agrees that a mini-trial of the previous charge ought not to be permitted to occur. The majority states, and I agree, that the proper exercise of the trial judge's authority to con-

trol both the direct examination and cross-examination of a witness "will prevent the determination of [the prior conviction] aggravating circumstance from becoming a 'mini-trial' of the previous charge."

The majority concludes, however, that the trial judge in this case did properly exercise his authority to this effect. I disagree with this conclusion.

The trial judge here permitted the witness's direct examination by the state to continue until it now occupies more than six pages in the transcript. The examination covers such details of the prior offense as the victim's age, size and weight; marital status; victim's residence next door to defendant's sister; the time of the offense; defendant's size and weight; and various details involving the act of sexual intercourse with the victim, including defendant's statements during the act and whether

defendant ejaculated. This rather extensive direct examination which would have been appropriately complete for the trial of the rape itself prompted an extensive cross-examination by defendant which occupies some nineteen pages of the record. The cross-examination ranges over such subjects as the victim's estrangement from her husband at the time of the rape; the manner in which defendant gained entry into the victim's home; certain prior inconsistent statements allegedly made by the victim; the victim's alleged possession with her husband of certain pornographic movies; and the manner in which defendant exited the victim's home.

An extremely small portion of both the direct examination and the cross-examination dealt with the question of defendant's use or threat of violence to the victim of the Georgia rape. Although the majority agrees that this would have been the only appropriate purpose for

the testimony, nevertheless it somehow concludes that Judge Ferrell did not commit error in allowing the wide-ranging direct examination and cross-examination on subjects irrelevant and immaterial to the only appropriate evidential inquiry. Suffice it to say that if what occurred at this sentencing hearing did not constitute a "mini-trial" on the Georgia rape conviction, then I am hard put to conceive of what would be a mini-trial.

Finally, the majority relies on State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) (Taylor II), to sustain its decision on this point. What happened in Taylor II bears no resemblance to what happened in the instant case. Defendant in Taylor II had, in fact, been convicted of the first degree murder of Cathy King at the 25 September 1978 Session of Johnston Superior Court. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979) (Taylor I).

The murder in Taylor I was prosecuted as a capital case. The record reveals that only one aggravating circumstance was submitted to the jury, i.e., was the murder "especially heinous, atrocious or cruel." Although the jury answered this aggravating circumstance affirmatively, it also found the existence of the mitigating circumstance that the murder was committed while defendant "was under the influence of mental or emotional disturbance." The jury found beyond a reasonable doubt that the mitigating circumstance was insufficient to outweigh the aggravating and that the aggravating was sufficiently substantial to call for the imposition of the death penalty. Nevertheless, it recommended life imprisonment. This Court found no error in defendant's conviction in Taylor I.

In Taylor II, relied on by the majority here, the state was permitted to offer the testimony of the pathologist who performed the autopsy

on the body of Cathy King, the victim in Taylor I. The record in Taylor II reveals that the pathologist testified simply as follows:

> I did an autopsy on the body of Cathy King on January 3, 1978. I found six separate gunshot wounds. We found two on the chest, one on the left side below the neck, and one on the right side. There was one on the left arm and one on the right hand. The wounds were very close indicating that the gun was properly several feet away when it was fired, rather than a few inches. In my opinion, her death was a result of the gunshot wounds that I have described.

There was no cross-examination of the pathologist.

The brief testimony of the pathologist in Taylor II was not permitted to degenerate into a mini-trial of defendant's guilt of the Cathy King, Taylor I, murder. Silhan was not referred to in Taylor II. There is no hint in Taylor II that this Court intended to, nor in my view did it, retreat from what it said in Silhan on this subject.

In Taylor II the state argued that it should be permitted to offer this brief testimony

of the pathologist, a disinterested witness, to show not only that defendant Taylor had previously been convicted of first degree murder, but also that this murder was accompanied by an aggravating circumstance, i.e., the murder was "especially heinous, atrocious or cruel," G.S. 15A-2000(e)(9), which qualified the murder as potentially deserving of the death penalty. This Court in Taylor II agreed essentially with this argument, holding that "[i]f the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed." 304 N.C. at 279, 283 S.E.2d at 780. Taylor II does not hold that testimony will be admissible to show any and all circumstances of the commission of every crime defendant's conviction of which is sought to be offered as an aggravating circumstance. Taylor II holds only that when the prior crime is a capital crime, i.e., first

degree murder, then brief testimony will be allowed to show those aggravating and mitigating circumstances which were found by the jury in the prior case to have existed.

Finally, there was no necessity for offering any testimony for the purpose of showing that defendant's Georgia rape conviction was a crime involving violence or threat of violence to the victim. The majority notes that defendant's Georgia rape conviction was obtained under section 16-6-1(a) of the Georgia Code which provides, "A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will . . . ." Ga. Code Ann. §§ 16-6-1(a) (1982). This Court said, moreover, in Taylor II, 304 N.C. at 279, 283 S.E.2d at 780: "Nothing else appearing, rape involves the use of threat of violence to the person." Thus, defendant's Georgia rape conviction was "of a felony involving the use

or threat of violence to the person" as a matter of law. Defendant's stipulation that he had been so convicted was in law also a stipulation that the crime involved violence or threat of violence to the person.

There being no necessity then for the state to prove this element through the testimony of witnesses, I think it was error prejudicial to defendant to permit any testimony at all on this point.

The Fair Sentencing Act, now our statutory scheme for sentencing most classes of felons, was recently enacted by our General Assembly. See Comment, The North Carolina Fair Sentencing Act, 60 N.C. L. Rev. 631, 631 n. 1 (1982). It supports my position that testimony in a capital sentencing hearing should be permitted on the prior conviction aggravating circumstance only if necessary to show that the prior conviction did involve the use or threat of violence or

that a prior conviction for first degree murder was accompanied by statutory aggravating or mitigating circumstances, or both. This Act provides for presumptive sentences to be imposed for each felony conviction unless aggravating or mitigating circumstances are shown which might justify a greater or lesser sentence. One of the statutory aggravating circumstances is that "[t]he defendant has a prior conviction of convictions for criminal offenses punishable by more than 60 days' confinement." G.S. 15A-1340.4(a)(1)(o). Subsection (e) of this statute provides:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Because the legislature has so clearly stated its intent as to how prior convictions should

ordinarily be proved in the Fair Sentencing Act, I am satisfied the legislature had a similar intent with regard to the proof of prior felony convictions in our capital punishment sentencing statute.

State v. McCormick, 397 N.E.2d 276 (Ind. 1979), also supports my position on this question. In McCormick the Indiana Supreme Court considered provisions of the Indiana capital sentencing statute which permitted the state to prove as aggravating circumstances the following (numbered as they appear in the statute):

> (7) The defendant has been convicted of another murder.
>
> (8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.
>
> (9) The defendant was under a sentence of life imprisonment at the time of the murder.

397 N.E.2d at 278 (citing Ind. Code § 35-50-2-9

(b) (Burns 1979)). The Indiana Supreme Court concluded that subsection eight of the sentencing statute violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court reasoned that this subsection would permit the state to try during the sentencing phase of a capital case another, unrelated murder. The Court concuded that this procedure would be so inflammatory and impermissibly prejudicial in the sentencing phase it would deny defendant due process. The Court considered subsection eight to be qualitatively different from subsections seven and nine of the statute. It said, 397 N.E.2d at 280-81:

> Similarly, evidence introduced to prove subparts (7) and (9) also does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously. Gregg v. Georgia, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859. Subparts (7) and (9) concern whether '[t]he defendant has been convicted of another murder' and whether '[t]he defendant was under a sentence of life imprisonment at the time of

> the murder.' Evidence of these aggravating circumstances will almost always be in the form of court or prison records. Unlike a complete presentation of evidence regarding an unrelated murder, this evidence, in the context of this sentencing procedure, would not be of an inflammatory and improperly prejudicial nature. See Spencer v. Texas, (1967) 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606.

Thus, permitting the sentencing phase of a capital case to degenerate into a mini-trial or retrial of a previous offense, as happened here, may raise serious constitutional questions. Clearly, permitting such a retrial is contrary to the legislature's intent.

B.

For the reasons stated in my dissenting opinion in State v. Pinch, 306 N.C. 1, 38, 292 S.E.2d 203, 230 cert. denied, ___U.S.___, 74 L.Ed.2d 622, 103 S.Ct. 474 (1982), I also disagree with the majority's position that it was not error for the trial judge to instruct the jury that it had a duty to recommend death

if it answered the various issues submitted favorably to the state. I continue to think that a jury never has a duty to recommend death no matter how it answers the issues. It may not recommend death unless it answers the issues in a certain way. Even if it answers these issues that way, however, the jury ought still be permitted to recommend life as, indeed, juries did in State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980), and State v. Taylor, supra, 298 N.C. 405, 259 S.E.2d 502 (Taylor I).

C.

I concur with the majority's view of the manner in which the issues should be submitted in a capital case as set out in Part III D of its opinion. I believe, however, that the trial judge's formulation of and instruction on the fourth issue constituted error entitling defendant to a new sentencing hearing. The jury

was told on this issue to determine the substantiality of the aggravating circumstances standing alone and without regard to and not discounted by the mitigating circumstances.

Justice Stevens, in a concurring opinion on a denial of certiorari, Pinch v. North Carolina, ___U.S.___, 74 L.Ed.2d 622-23, 103 S.Ct. 474, 475 (1982), cautioned that such an instruction might be contrary to the holding in Lockett v. Ohio, 438 U.S. 586 (1978). He wrote:

> In each of these three capital cases the trial judge instructed the jury that it had a duty to impose the death penalty if it found: (1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances. There is an ambiguity in these instructions that may raise a serious question of compliance with this Court's holding in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954, 9 Ohio Ops 3d 26 (1978).

On the one hand, the instructions may be read as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty. Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.' Lockett, supra, 438 US, at 601, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26 (plurality opinion), quoting Woodson v. North Carolina, 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

. . . .

The petitions for certiorari in these three cases request the Court to review the decision of the Supreme Court of North Carolina affirming the death penalty in

> each case. I do not criticize the Court's action in denying certiorari because the question whether the instructions to the juries are consistent with Lockett remains open for consideration in collateral proceedings. Moreover, even if relief may not be warranted in these cases, the North Carolina judiciary may find it appropriate to make slight changes in the form of its instructions to avoid the ambiguity I have identified.

___U.S.___, 74 L.Ed.2d at 622-23, 103 S.Ct. at 474-75 (footnote ommitted).

The majority recognizes that this kind of instruction is not contemplated by the statute. Justice Stevens is of the opinion that it may be unconstitutional. I agree with both of these positions and would give defendant a new sentencing hearing on the strength of this error committed by the trial judge.

NORTH CAROLINA GENERAL STATUTES
CHAPTER 15A, ARTICLE 100
CAPITAL PUNISHMENT

(a) Separate Proceedings on Issue of Penalty.

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve

in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of

the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its

deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

1983

STATE OF NORTH CAROLINA)
)
vs.) No. 86281 Mecklenburg County
)
MICHAEL VAN McDOUGALL)

This cause came on to be argued upon the transcript of the record from the Superior Court Mecklenburg County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable HARRY C. MARTIN, ASSOCIATE Justice, be certified to the said Superior Court, to the intent that the PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION (IN ALL INDICTMENTS)

And it is considered and adjudged further, that the Defendant Do Pay the costs in this Court incurred, to wit, the sum of ***EIGHTY-ONE AND 00/100 dollars ($81.00), and execution issue therefor. Certified to Superior Court this 25th day of April 19 83.

J. GREGORY WALLACE
By: s/ Peggy N. Byrd, Deputy Clerk

in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its

sentence recommendation.

(c) Findings in Support of Sentence of Death.

When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence.

(1) The judgment of conviction and sentence of death shall be subject to automatic

review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is ex-

cessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances.

Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device

or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great

risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.

Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence

of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution

in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

CHARGE OF THE COURT TO THE JURY:

Members of the Jury, having found the defendant, Michael Van McDougall, guilty of first-degree murder on the first phase, or guilt determination phase of the trial, this second phase or sentencing proceeding has been required under the law of North Carolina. It is now your duty to recommend to the Court whether the defendant will be sentenced to death or life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

There is no requirement in this phase of the proceeding that evidence offered during the first phase again be offered. All the evidence presented before you in both phases of the case is for your consideration in this sentencing proceeding; and you are to recall, consider, and weigh all of the

evidence offered during the first and second phase of the case.

In arriving at the facts in the case, you may believe all or part or none of what any witness has had to say from the witness stand. And you are the sole judges of the weight to be given the testimony of any witness who has appeared before you. Again, it is your duty to recall, consider, and weigh all of the evidence in both phases of the case, and to take your own recollection as to what the evidence was in the case.

Your duty is to find the facts from the evidence in the case and to those facts, whatever you find them to be, to apply the law given you in the course of these instructions.

It is my duty to declare and explain the law arising on the evidence, and to summarize the evidence to the extent necessary to explain the application of the law to the evidence. I heretofore on the first phase of the trial during my instructions to you gave you my recollection in a brief summary of what the evidence tended to show. I will not

again repeat that brief summary. It is your duty to recall, consider, and weigh all of the evidence.

As the Court recalls, the State of North Carolina offered evidence which it contends tends to show:

That the defendant was convicted of rape in the State of Georgia on March 11, 1974. That the defendant, previous to stabbing Diane Parker, stabbed Vicki Dunno with a knife. That he had dragged Vicki Dunno and Diane Parker into their residence. That he told Diane Parker he would kill her if she didn't put down a knife she had. That he subsequently chased after her and stabbed her with a knife some twenty-two times. That Vicki Dunno told Diane Parker to run.

As the Court recalls, the defendant offered evidence tending to show, and which he contends does, in fact, show, that the defendant, since the death of his grandfather, has experienced hallucinations in the form of his grandfather's voice. That on August 20 and 21, 1979, he injected a quantity of

cocaine intravenously. That he saw his mother striking him with a car antenna, and that he exploded and stabbed her. That he saw his mother running to his house and chased her and stabbed her. That he didn't recall for many months the stabbings or what he had observed. This his capacity to appreciate the wrongfulness of his conduct and to conform it to the requirements of law was impaired.

That is some of the evidence offered by the State and the defendant. What, if anything, the evidence shows is for you, the jury, to say and determine.

Your recommendation in this phase of the case is to be based upon your consideration of and answers to certain questions which will be submitted to you. These questions, a copy of which you have before you, read as follows:

1. Do you find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

a. Has the defendant previously been convicted

of a felony involving the use of violence to the person?

b. Was the murder in this case committed for the purpose of avoiding or preventing a lawful arrest?

c. Was the murder in this case especially heinous, atrocious, or cruel?

d. Was the murder in this case part of a course of conduct by the defendant which included the commission by the defendant of another crime of violence against another person?

2. Do you find from the evidence the existence of one or more of the following mitigating circumstances?

a. Was the murder in this case committed while the defendant was under the influence of mental or emotional disturbance?

b. Was the defendant's capacity to conform his conduct to the requirements of law impaired?

c. Was the age of the defendant at the time of the murder in this case a mitigating factor?

d. Is there any other circumstance or circumstances arising from the evidence which you deem to have mitigating value?

3. Do you find, by a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

Depending upon your answer to these questions submitted to you, then you would be called upon to recommend whether the punishment for the defendant, Michael Van McDougall, shall be death or life imprisonment.

The first question for your consideration reads as follows:

1. Do you find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

On this same issue, the burden of proof is upon the State to prove to you, the jury, from the evidence and beyond a reasonable doubt the existence of one or more of the aggravating circumstances submitted to you for your consideration. As to any such circumstance, you must agree unanimously that it has been proven to you beyond a reasonable doubt.

A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt. But rather, a reasonable doubt is a fair doubt based on reason and common sense and growing out of some evidence or lack of evidence in the case.

An aggravating circumstance is a fact or group of facts which adds weight to, increases, or magnifies a particular murder, which tends to make a specific murder particularly deserving of the maximum punishment prescribed by law. The law of North Carolina specifies the aggravating circumstances which might justify a sentence of death, and only those circumstances provided by statute about which I instruct you may be considered by you. Under the

evidence in this case, four possible aggravating circumstances may be considered by you. I will not explain the applicable law as to each of these circumstances.

The first circumstance you may consider reads as follows:

a. Has the defendant previously been convicted of a felony involving the use of violence to the person?

As to this circumstance, the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the defendant previously had been convicted of a felony involving the use of violence to the person.

The crime of rape is a felony involving the use of violence to the person. A person has been previously convicted if he has been convicted and not merely charged, and if his conviction is based on conduct which occurred before the events out of which this murder arose. A conviction means a finding of guilt of a particular crime by a judicial authority, whether such finding was based upon a plea of guilty or a

verdict of a jury after a plea of not guilty.

If you find, Members of the Jury, from the evidence beyond a reasonable doubt that on or about March 11, 1974, Michael Van McDougall had been convicted of rape of Mary Huff in the State of Georgia, and that such conviction was previous in time to the murder in this case on August 21, 1979, it would be your duty to find this aggravating circumstance, and you would indicate so by answering this sub-part(a) "Yes." If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and you would indicate by answering this sub-part (a) "No."

The second circumstance you may consider reads as follows:

b. Was the murder in this case committed for the purpose of avoiding or preventing a lawful arrest?

As to this circumstance, the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the defendant committed the

murder in this case for the purpose of avoiding a lawful arrest.

A murder is committed for such purpose if the defendant's purpose, or at least one of the purposes motivating the killing, was the defendant's desire to avoid subsequent detection and apprehension for his wrongful conduct. In a broad sense every murder silences the victim, thus having the effect of aiding the perpetrator in the avoidance or prevention of his arrest. Therefore, before you could find the existence of this circumstance, you must be satisfied from the evidence beyond a reasonable doubt that at least one of the purposes motivating the killing was the defendant's desire to avoid detection and apprehension. The existence of such a motivation may be inferred from the circumstances proven in evidence, such as the nature and manner of the killing, the conduct of the parties previous to, at the time of, and subsequent to the killing, the declarations or statements of the parties, and other relevant circumstances. However, the mere fact of a death is not sufficient to warrant such a finding.

So, if you find from the evidence, beyond a reasonable doubt, that at the time of the commission of the murder in this case, that it was, in fact, the defendant's purpose to avoid or prevent his arrest for the commission of the crime of kidnapping or assault with a deadly weapon with intent to kill inflicting serious injury, by killing Diane Parker, it would be your duty to find this aggravating circumstance, and you would indicate so by answering this sub-part (b), "Yes." If you do not so find, or if you have a reasonable doubt as to one or more of these things, you would not find this aggravating circumstance, and you would indicate so by answering this sub-part (b), "No."

The third circumstance you may consider reads as follows:

c. Was the murder in this case especially heinous, atrocious, or cruel?

As to this circumstance, the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the murder is this case was especially heinous, atrocious, or cruel.

A person of ordinary sensibility could fairly characterize almost every murder as "especially heinous, atrocious or cruel." Not every murder is especially so. Before you may find the existence of this circumstance, the State must prove beyond a reasonable doubt that the brutality involved in the murder in this case exceeds that normally present in any killing.

The words "especially heinous, atrocious, or cruel" mean extremely or especially or particularly heinous or atrocious or cruel. Heinous means hateful, odious, and reprehensible, and it also means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce, outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.

For you to find this murder to have been "especially heinous, atrocious, or cruel," it must have been done without conscience and pitiless and so as

to be unusually torturous to Diane Parker, that is, in the nature of torture or serious physical abuse of Diane Parker before death.

So then, Members of the Jury, if you find from the evidence beyond a reasonable doubt that the murder of Diane Parker was especially heinous, atrocious, or cruel, then it would be your duty to find this aggravating circumstance, and you would indicate so by answering this sub-part (c) "Yes." If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and you would indicate so by answering this sub-part (c) "No."

The fourth circumstance you may consider reads as follows:

d. Was the murder in this case part of a course of conduct by the defendant which included the commission by the defendant of another crime of violence against another person?

As to this circumstance the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the murder in this case was a

part of a course of conduct by the defendant which included the commission by the defendant of another crime of violence against another person.

The murder of Diane Parker would have been part of a course of conduct by the defendant if you find beyond a reasonable doubt that an assault with a deadly weapon with intent to kill Vicki Dunno by the defendant was part of a continuous series of acts or continuous conduct on the part of the defendant which established that there existed in the mind of the defendant a plan, scheme, system or design which involved both the murder and the assault. In other words, a murder is part of such a course of conduct if it and the other crime of violence are both part of a pattern of the same or similar acts repeated over a period of time, however short, which establish that the defendant had a plan, scheme, system or design which involved both the murder and the assault.

Assault with a deadly weapon with intent to kill inflicting serious injury is a crime of violence, and if such crime was committed against one other than

the victim of the murder, it would be the commission of another crime of violence against another person.

So, if you find from the evidence beyond a reasonable doubt that in addition to killing Diane Parker, the defendant, Michael Van McDougall, on or about August 21, 1979, stabbed Vicki Dunno with a knife with intent to kill her inflicting serious injuries upon her, and that this crime was included in the same course of conduct in which the killing of Diane Parker was also a part, then it would be your duty to find this aggravating circumstance, and you would indicate so by answering this sub-part (d), "Yes." If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and you would indicate so by answering this sub-part (d) "No."

Now, Members of the Jury, as to this first issue, if you unanimously find from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances submitted to you exist, and have so indicated by answering "Yes" as to those aggravating circumstances which you find, then it would be your

duty to answer the first issue "Yes" in the blank space provided immediately under the first issue. If you do not unanimously find from the evidence beyond a reasonable doubt the existence of at least one of the aggravating circumstances submitted to you, then it would be your duty to answer this first issue "No" in the blank space provided immediately under the first issue.

If you answer the first issue "No," you would not consider the remaining issues, and you must then recommend that the defendant be sentenced to life imprisonment. If you answer the first issue "Yes," you would then proceed to a consideration of the second issue, which reads as follows:

2. Do you find from the evidence the existence of one or more of the following mitigating circumstances?

A mitigating circumstance is that circumstance arising from the evidence which does not constitute a justification or excuse for a killing, or which reduces it to a lesser degree of crime than first-degree murder, but which nevertheless may be

considered as extenuating or reducing the moral culpability of the killing, or which makes it less deserving of extreme punishment than other first-degree murders. The law of North Carolina specifies the mitigating circumstances which might be considered by you, and only those circumstances created by statute, about which I shall instruct you, may be considered by you.

The defendant has the burden of persuading you of the existence of any mitigating circumstances. The defendant must satisfy you from the evidence taken as a whole, not beyond a reasonable doubt, but merely to your satisfaction, of the existence of any mitigating circumstance. If you are so satisfied, you would answer "Yes" as to that circumstance; otherwise, "No."

I will now explain to you the applicable law as to each of these circumstances. The first circumstance you shall consider reads as follows:

a. Was the murder in this case committed while defendant was under the influence of mental or emotional disturbance?

Being under the influence of mental or emotional disturbance is similar to being in a heat of passion upon adequate provocation. Generally, heat of passion upon adequate provocation means that a person's state of mind, mental or emotional, was at the time so violent as to overcome his reason, such that he could not form a deliberate purpose and control his actions, and which may consist of anything which has a natural tendency to produce such passion in a person of average mind or disposition. However, as to this circumstance, a person may be under the influence of mental or emotional disturbance even though he had no adequate provocation and even though his mental or emotional disturbance was not so strong as to constitute heat of passion or to preclude deliberation. Mental or emotional disturbance may result from any cause or may exist without apparent cause. For this mitigating circumstance to exist, it is sufficient that the defendant's mind or emotions were disturbed, that is, interrupted or interferred with, from any cause, whether from consumption of drugs, mental illness, or other cause, and that he

was under the influence of that disturbance when he killed Diane Parker. A person would be under the influence of mental or emotional disturbance if a mental or emotional condition existed which influenced his conduct so as to make it different than it otherwise would have been.

So, if you are satisfied from the evidence that at the time of the murder of Diane Parker, the defendant was under the influence of mental or emotional disturbance, from any cause, then it would be your duty to find this mitigating circumstance, and you would indicate so by answering this sub-part (a) "Yes." If you do not so find, you would indicate so by answering this sub-part (a) "No."

The second circumstance you shall consider reads as follows:

b. Was this defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law impaired?

As I instructed you in the first phase of this case, a person would be legally insane if, as a result of mental disease or defect, he did not know

the nature and quality of his act, or did not know his act was wrong.

Ladies and Gentlemen of the Jury, there is a typographical error in the next sentence. I will read the sentence as it should be: However, as to this circumstance, the capacity to appreciate the criminality of one's conduct or conform his conduct to the law is not the same. That phrase appearing thereafter is stricken. This means, Members of the Jury, that this circumstance is not the same as I instructed you with regard to legal insanity. Even though a defendant may know that his act is wrong, he may nevertheless lack capacity to appreciate its wrongfulness, that is, to fully comprehend or be fully sensible of the criminality or wrongfulness of his conduct. It is sufficient if his capacity to appreciate the wrongfulness of his conduct was impaired, that is, lessened or diminished.

Even though the defendant did appreciate the criminality of his conduct, if his capacity to follow the law and refrain from engaging in the illegal conduct was impaired, this circumstance would then

exist, since a person may appreciate that his conduct is wrong and still lack the capacity to refrain from such conduct.

The defendant need not have lacked all capacity to conform. It is sufficient if such capacity as he might otherwise have had is impaired, that is, lessened or diminished.

The cause of such impaired capacity may be mental disease, defect, or illness or the effect of drug intoxication, or any other cause sufficient to cause an impairment of the capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law.

So, if you are satisfied from the evidence that at the time of the murder of Diane Parker, the defendant's capacity to appreciate the criminality of his conduct was impaired, and/or that the defendant's capacity to conform his conduct to the requirement of law was impaired, then it would be your duty to find this mitigating circumstance, and you would indicate so by answering this sub-part (b) "Yes."

If you do not so find, you would indicate so by answering this sub-part (b) "No."

The third circumstance you shall consider reads as follows:

c. Was the age of the defendant at the time of the murder in this case a mitigating factor?

If you find that the age of the defendant at the time of the murder in this case was an extenuating factor, or lessens the severity of, or suggests a lesser penalty for the murder of Diane Parker, then it would be your duty to find this mitigating circumstance, and you would indicate so by answering this sub-part (c) "Yes." If you do not so find, you would indicate so by answering this sub-part (c) "No."

The fourth circumstance you shall consider reads as follows:

d. Is there any other circumstance or circumstances arising from the evidence which you deem to have mitigating value?

As to this circumstance, you may consider any circumstance from the evidence which you are satisfied lessens the seriousness of the murder or

suggests a lesser penalty than otherwise may be required, such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value. Specifically, you may consider (1) the defendant's love for his wife; (2) the defendant's love for his child; (3) the defendant's attitude toward abortion; (4) the defendant's attempt to remove himself from the drug culture in Georgia to lead a good and useful life; (5) his progress with psychotherapy; (6) his behavior when not suffering from the effects of mental illness; (7) any remorse as a result of his acts; (8) his behavior when not intoxicated with drugs; (9) his desire to love his family; (10) his employment experience at Pump and Lighting; and any other redeeming quality of the defendant. Likewise, you shall consider any other circumstances arising from the evidence which you deem to have mitigating value.

So then, if you find from the evidence any one or more of the mitigating circumstances specifically

enumerated in the preceding paragraph or any other mitigating circumstance arising from the evidence which you deem to have mitigating value, then it would be your duty to answer this sub-part (d) "Yes." Otherwise, "No."

So then, Members of the Jury, as to this second issue I instruct you that if you find one or more of the mitigating circumstances from the evidence, it would be your duty to answer the issue "Yes," and you would do so by placing your answer in the blank space provided immediately under the second issue. If you do not find at least one of these mitigating circumstances from the evidence, you would then answer this second issue "No," and you would do so by placing your answer in the black space provided immediately under the second issue.

In any event, whether you answer this issue "Yes" or "No," if you have answered the first issue "Yes," you will proceed to consider the third issue.

The third issue for your consideration reads as follows:

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

On this issue the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to outweigh any aggravating circumstances you may have found.

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. Your weighing should not consist of merely adding up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and

finally determine whether the aggravating circumstances outweigh the mitigating circumstances.

So then, Members of the Jury, if the State has proven to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to--that is, do not--outweigh the aggravating circumstances you find, it would then be your duty to answer this third issue "Yes." However, if you do not so find, or if you have a reasonable doubt, then it would be your duty to answer this issue "No."

If you answer this issue "Yes," then you would come to consider the fourth issue. If you answer this issue "No," it would be your duty to recommend that the defendant be sentenced to life imprisonment.

The fourth issue for your consideration reads as follows:

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

On this issue the burden is on the State to prove to you from the evidence beyond a reasonable doubt that the aggravating circumstances found, if any, are sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the state to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer "Yes," you must agree unanimously that they are.

If you unanimously find beyond a reasonable doubt that any aggravating circumstance or circumstances found by you are sufficiently substantial to call for the death penalty, you would answer this issue "Yes." If you do not so find, or have

a reasonable doubt, then you would answer this issue "No."

If you answer this issue "No," it would be your duty to recommend that the defendant be imprisoned for life.

So then, Members of the Jury, finally I instruct you for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt, as I have defined that term, from the evidence:

FIRST, that one or more statutory aggravating circumstances existed; and,

SECOND, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances, if any, found by you; and,

THIRD, that the aggravating circumstances, if any, found by you are sufficiently substantial to call for the imposition of the death penalty.

If the State has proven these three things to you beyond--

MR. PAUL: If Your Honor please, at this point

we OBJECT to the Charge, and I would like to be heard before you go further.

THE COURT: I will let you be heard shortly. If the State has proven these three things to you beyond a reasonable doubt, and you unanimously so find, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find, or if you have a reasonable doubt to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

You will indicate your recommendation on the issue sheet submitted to you.

In your deliberations, it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; to decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but not to surrender your honest conviction as to the weight or

effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

So then, Members of the Jury, you may retire to your jury room and begin your deliberations. When you have arrived at your recommendation, knock upon the jury door and you will be admitted to the courtroom to announce your recommendation.

The alternate jurors shall remain outside of the jury room. Let the twelve jurors be escorted to the jury room to commence their deliberations.

(The twelve trial jurors retired to the jury room.)

I S S U E S

1. Do you find from the evidence, beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

ANSWER: Yes

a. Has the defendant previously been convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

b. Was the murder in this case committed for the purpose of avoiding or preventing a lawful arrest?

ANSWER: No.

c. Was the murder in this case especially heinous, atrocious, or cruel?

ANSWER: Yes.

d. Was the murder in this case part of a course of conduct by the defendant which included the commission by the defendant of another crime of violence against another person?

ANSWER: Yes.

2. Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes.

a. Was the murder in this case committed while the defendant was under the influence of mental or emotional disturbance?

ANSWER: Yes.

b. Was the defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law impaired?

ANSWER: Yes

c. Was the age of the defendant at the time of the murder in this case a mitigating factor?

ANSWER: No.

d. Is there any other circumstance or circumstances arising from the evidence which you deem to have mitigating value?

ANSWER: Yes.

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

ANSWER: Yes.

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes

No. 82-2105

In The
Supreme Court of the United States
October Term, 1983

MICHAEL VAN McDOUGALL,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General

JOAN HERRE BYERS
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 733-2011

Attorneys for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Are the North Carolina jury instructions for a death penalty sentencing hearing as used in the present matter before the Court consistent with federal constitutional principles generally and the holding of *Lockett v. Ohio*, 438 U. S. 586 (1978) specifically?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

No. 82-2105

In The

Supreme Court of the United States

October Term, 1983

MICHAEL VAN McDOUGALL,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the petition of Michael Van McDougall and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case is reported in *State v. McDougall*, 308 N. C. 1, 301 S. E. 2d 308 (1982).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. § 1257(3).

STATEMENT OF THE CASE

In the early morning of August 21, 1979, Michael Van McDougall, a convicted rapist and burglar from Georgia, was arrested for the murder of Diane Parker and for the felonious assault on Vicki Dunno after he was found, smeared with blood, hiding in the bushes near Diane's partially disrobed body. When apprehended, McDougall had the presence of mind to demand a lawyer (R. 43). He also developed amnesia about the events in question.

At the September, 1979 term of the Mecklenburg County Grand Jury, McDougall was indicted for the first degree murder of Diane Parker (79 CR 47697) and assault with a deadly weapon with intent to kill inflicting serious bodily injury on Vicki Dunno (79 CR 47734). On October 11, 1979 the defense requested a continuance until November, 1979. On November 13, 1979, the Mecklenburg County Grand Jury indicted McDougall for first de-

gree kidnapping of Diane Parker (79 CR 067081), first degree kidnapping of Vicki Dunno (79 CR 067084), and first degree burglary (79 CR 067087). These indictments, along with the indictments handed down in September, 1979, were all based upon the events happening August 21, 1979.

On November 15, 1979 the defense filed a second motion to continue, this time until February 4, 1980 (R. 19). On January 18, 1980 the defendant moved for a continuance until March 17, 1980 (R. 39). On April 18, 1980 the defense requested a continuance from the May 12, 1980 trial date until June 9, 1980 due to Dr. Teich's (the defense's chief psychiatrist) desire to vacation in China and attend some workshops in San Francisco (R. 63-64). On June 5, 1980 the defense attempted to get yet another continuance on the ground that the petitioner needed additional time for further treatment of his alleged amnesia. This motion was denied and the case went to trial.

The State of North Carolina presented evidence which showed the following:

At approximately 2:30 a. m., August 21, 1979, Officer W. K. Crisler observed a person later identified as Michael Van McDougall driving a flatbed truck at the intersection of Fairview and Sardis Road in Charlotte, North Carolina (T. 1661). Because in the mind of Officer Crisler it was unusual for such a truck to be driven at that time of night, he observed the truck closely. It was being driven in a normal manner (T. 1663). The intersection of Fairview and Sardis Road is located some one and one-half to two miles from 1420 Blueberry Lane in the City of Charlotte.

Vicki Dunno and Diane Parker shared a house at 1420 Blueberry Lane.

At approximately 2:45 a.m., Vicki and Diane were awakened by the doorbell ringing (T. 1922). They went to their front door and heard a male voice begging to get in the house. This person said his wife had cut her leg "real bad," that he needed bandages and alcohol, and he needed to call a doctor (T. 1923). He continued to beg for help. Diane went to the bathroom, got alcohol and bandages and put them outside the back door. She then came back to the front of the house. When the person began calling Diane by name, saying he needed to talk to her, that he needed help, that his wife was hurt, Diane answered him (T. 1925). He then said he was her neighbor, Mike, that his wife was hurt "really badly" and that he needed help. After he continued pleading and begging to get into the house, Diane Parker finally opened the door and let the petitioner, Michael Van McDougall, into the house (T. 1926). The three persons walked into the kitchen where Vicki Dunno got the telephone directory off the refrigerator to find a doctor to call (T. 1928). While Vicki was looking up a number, the defendant walked from the kitchen to the den and obviously started "checking out" the house. Diane took the telephone book from Vicki and began to dial for help (T. 1930). McDougall came back from the den into the kitchen and picked up a butcher knife from the women's cutting board. Vicki told Diane to look out, he had a knife (T. 1930). McDougall grabbed Diane by the arm, put the knife in front of her face and told her to put down the telephone (T. 1930). Diane tried to get away from him and in the struggle the two knocked over one of the kitchen stools and the telephone was

knocked out of Diane's hand. McDougall and Diane fell to the floor. Vicki ran out the front door to try to get help (T. 1931). When Vicki got to the grass, it was wet and she slipped and fell. Her glasses flew off. She was trying to find her glasses when McDougall came running out of the house, grabbed Vicki by the arm and told her she wasn't going anywhere (T. 1932). Diane came out of the house with a knife in her hand and told McDougall if he hurt Vicki, she'd kill him (T. 1933). McDougall realized Diane had a knife. He let go of Vicki and wrestled Diane down in some bushes in front of their porch. Vicki screamed at Diane not to fight because she knew McDougall had a knife. The knife Diane had was thrown down in the driveway and Diane stopped struggling (T. 1934). McDougall grabbed Diane and Vicki by the back of the hair and dragged both of them back into the house. Diane was bleeding from the nose and forehead by then (T. 1935). McDougall weighed two hundred and twenty pounds; he was six feet two inches tall. Vicki was five feet ten inches tall and weighed one hundred and thirty pounds. Diane was only five feet two inches tall and weighed one hundred and twenty-five pounds.

McDougall forced Vicki to get her car keys and give those keys to him. He then dragged Diane and Vicki out to Vicki's automobile. He asked Vicki which key was the trunk key. He told Diane he was going to put them in the trunk until he got where they were going; then he'd let them out (T. 1937). Diane screamed for Vicki not to let him have the keys. Vicki threw the keys away. McDougall then threw Vicki to the ground and started stabbing her. Vicki screamed to Diane that he was stabbing her. Diane ran for help in the direction of the neighbor's

house (T. 1937). When McDougall saw her run away, he got up and chased her (T. 1938) and caught Diane. Vicki crawled back to the house and called for help (T. 1939). Lynda McDougall, the wife of the defendant, telephoned and asked what was happening. Vicki told her she had been stabbed and that Diane was outside with the assailant.

When the police arrived they found Diane's body sprawled in front of 1400 Blueberry Lane, McDougall's home. Diane's body was clothed only with a nightgown which had been pulled up to her chest, exposing her pubic area and one breast. Her knees were pulled up and her legs were parted wide. She had been stabbed twenty-two times; most of the wounds were inflicted when she was in a prone position. She also had multiple contusions on her body.

The officers brought in searchlights to aid in the investigation, and, once these lights were operating, McDougall came out from behind some bushes saying, "I give up. Okay, I give up." He was smeared with blood. The blood on McDougall was consistent with Diane Parker's blood type.

Vicki Dunno, rushed to a hospital, survived her nine stab wounds although she has been severely scarred.

McDougall put on evidence indicating that he suffered from a cocaine induced psychosis as well as underlying depression and organic brain damage. For some two weeks he put on evidence that his psychosis stemmed from childhood experiences such as his grandfather's suicide, his father's murder when McDougall was fourteen (T. 2677), his brother's and his horse being poisoned (T. 2731),

and his brother's and his experiences killing cats by dropping mortar blocks on them (T. 2751).

On the night of the arrest, McDougall allegedly injected nearly five grams of cocaine before he invaded Diane and Vicki's home. However, blood analysis failed to reveal significant amounts of cocaine or its metabolites in his blood.

Though initially suffering from amnesia concerning the events in question, McDougall recovered his memory sufficiently by trial time to testify through his main psychiatrist, Dr. Teich,[1] that he thought he was fighting his mother who was beating him with an automobile antenna when he was, in actuality, stabbing Vicki Dunno (9 times) and then, running after, capturing, stabbing (22 times) and attempting to rape Diane Parker.

The jury convicted McDougall of first degree murder (felony murder); kidnapping Diane Parker, and assault with a deadly weapon with intent to kill, inflicting serious bodily injury on Vicki Dunno.

In the sentencing hearing on the first degree murder conviction, the State presented evidence of McDougall's

---

[1]Teich, a New York psychiatrist, was revealed during cross-examination to have been fired from his Health Services Agency job in New York, to be spending much of his time running basket import businesses called the Philippine Collection and Blackbeard and the Gypsy, and doing all of his psychiatric practice in criminal trials. He gave McDougall a series of diagnoses identical to those given by him in three other criminal trials, and, in fact, he had been a witness for chief defense counsel, Jerry Paul, in a disciplinary hearing in which he also gave a similar diagnosis of Paul (T. 3061-3134). In violation of a court order, Dr. Teich made available to the news media during jury deliberation a film of McDougall "under hypnosis" which had been ruled inadmissible by the trial court (T. 4190-4195).

prior convictions in Georgia for burglary (two counts) and rape. Through cross-examination of McDougall during the sentencing hearing, it was brought out that McDougall had been a drug dealer (T. 4375) and had often used cocaine (T. 4379-4380).

McDougall presented evidence of his lack of capacity and his suffering from emotional or mental disease.

The jury found three statutory aggravating circumstances existed, found mitigating circumstances existed, found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to warrant a sentence of death. McDougall was sentenced accordingly. He also received a life sentence for kidnapping and a twenty year sentence for the assault. He entered notice of appeal to the North Carolina Supreme Court. In this appeal, petitioner excepted to the sentencing instructions of the trial court on the basis that the jury should not be required to return a recommendation of death if the issues were all answered in the affirmative (T. 4475-4477). Petitioner also asserted that the trial court's submission of the penalty phase issues in this case (specifically the fourth issue), and his charge violated the requirements of *Lockett v. Ohio,* 438 U. S. 586 (1978), since the fourth issue arguably could be read to exclude consideration of mitigating circumstances, and denied McDougall due process of law (petitioner's state court brief, Argument 5). The State responded to the petitioner's contentions by stating that the instructions were given and the penalty issues presented in a manner consistent with established North Carolina case law and the statute itself (respond-

ent's state court brief, Argument 5). The North Carolina Supreme Court ruled, as a matter of state law, that "the fourth issue is not an isolated, independent question that may be answered without reference to the other issues and circumstances of the case. This is manifested by the language of the General Assembly—'[b]ased on these considerations' should the defendant be sentenced to death or life imprisonment. N. C. Gen. Stat. 15A-2000(b)(3) (Cum. Supp. 1981)." The Court further ruled that when considered contextually, the charge given in this case complied with State law and also was constitutionally adequate pursuant to the requirements of *Lockett v. Ohio, supra.* The North Carolina Supreme Court then affirmed the convictions and the sentences imposed.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The North Carolina jury instructions for a death penalty sentencing hearing approved by the North Carolina Supreme Court and used in this case are consistent with the holding of this Court in Lockett v. Ohio, 438 U. S. 586 (1978).

The Supreme Court of North Carolina, in *State v. Pinch,* 306 N. C. 1, 292 S. E. 2d 203 (1982), *cert. denied* — U. S. —, 74 L. Ed. 2d 622 (1982); *State v. Williams,* 305 N. C. 656, 292 S. E. 2d 243 (1982), *cert. denied,* — U. S. —, 74 L. Ed. 2d 622 (1982); and *State v. Smith,* 305 N. C. 691, 292 S. E. 2d 264 (1982); *cert. denied* — U. S. —, 74 L. Ed. 2d 622 (1982), as a matter of State law, construed the language of G. S. 15A-2000(b) and (c) to require the trial

court to charge the jury in a sentencing hearing in a first degree murder case that if the jury found (1) beyond a reasonable doubt that one or more statutory aggravating factors exist, (2) that beyond a reasonable doubt these aggravating factors are sufficiently substantial to warrant imposition of the death penalty, (3) mitigating circumstances exist, and (4) beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

In his concurrence in the denial of certiorari in *Pinch, Smith* and *Williams,* Justice Stevens expressed concern about whether or not this formula complied with the holding of *Lockett v. Ohio, supra,* by limiting the use of the mitigating factors. In the next case before the North Carolina Supreme Court after this concurrence, *State v. McDougall, supra,* that Court ruled as a matter of State law that G. S. 15A-2000(b)(3) mandated that the written finding made by the jury pursuant to G. S. 15A-2000(c)(3) "that the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty" be answered with reference to the other issues and circumstances of the case, and that "the jury must consider the aggravating circumstances found, the mitigating circumstances found, and the degree to which the aggravating circumstances outweigh the mitigating circumstances." 308 N. C. at 31. The Court then found when considered contextually, the charge given the jury complied with the requirements of the statute and was constitutional.

The petitioner does not now claim that the formula articulated by the Court in this matter is unconstitutional.

Indeed, the Court's interpretation of 15A-2000(c)(3) is precisely the one suggested in *Smith v. North Carolina, supra.* Rather, he merely alleges the North Carolina Supreme Court erred in ruling that the instructions, when read contextually, fall within the perceived requirements of G. S. 15A-2000. This issue is hardly "an important question of federal law which has not been, but should be, settled by this Court. . . ." Rule 17(c), Supreme Court Rules. Likewise, this clearly is not an issue where the North Carolina Supreme Court has decided "a federal question in a way in conflict with applicable decisions of this Court." Rule 17(c), Supreme Court Rules.

More importantly, even assuming that North Carolina had not modified the instructions as approved in *State v. Pinch, supra; State v. Williams, supra;* and *State v. Smith, supra,* the North Carolina sentencing instructions generally and the instructions given in this case specifically pass constitutional muster.

The Supreme Court cases indicate that statutory aggravating circumstances play a constitutionally necessary function of circumscribing the class of persons eligible for the death penalty. *Zant v. Stephens,* — U. S. — (1983). In Georgia and Florida, statutory aggravating circumstances found in the punishment phase of the trial separate the class of cases in which the death penalty is potentially appropriate from other first degree murders. *Zant v. Stephens, supra; Barclay v. Florida,* — U. S. — (1983). In Texas, this narrowing takes place by limiting by statute the categories of murders for which a death sentence may be imposed: *Jurek v. Texas,* 428 U. S. 262 (1976). As this Court noted, the action of Texas in narrowing the categories of murders for which a death penalty may be

imposed is the functional equivalent to the use of aggravating circumstances. *Jurek v. Texas, supra.* In North Carolina, the narrowing of the class prior to any formal balancing of aggravating and mitigating factors takes place in two stages. First, the jury must find aggravating factors to be present. This initial inquiry is not enough, however, to call for a formal balancing of those features of aggravation against any mitigating features. The further inquiry required by North Carolina is whether those aggravating factors are so substantial that the death penalty should be considered in this case. G.S. 15A-2000(c)(3). If the instructions given by the North Carolina trial court on the substantiality issue were insufficient to inform the jury that the finding included considering factors in mitigation, this still does not render the North Carolina sentencing scheme unconstitutional. This issue even without mitigating features considered further limits that class of cases in which the death penalty is appropriate. As noted in Footnote 1 in the concurrence in *Barclay v. Florida, supra,* "the Constitution does not require that nonstatutory mitigating circumstances be considered before the legal threshold is crossed and the defendant is found to be eligible for the death sentence. It is constitutionally acceptable to bring such evidence into the decision making process as part of the discretionary post threshold determination." Thus, North Carolina, no matter how this substantiality issue is interpreted, actually has more of the general narrowing of the class of persons eligible for the death penalty than does Georgia, Texas, and Florida, all of whose statutes and sentencing procedures have been found constitutionally permissible. *Jurek v. Texas, supra; Gregg v. Georgia,* 428 U. S. 153 (1976); *Barclay v. Florida, supra.*

After the class of persons has been narrowed, there is no constitutional requirement that any specific standards for balancing the features in aggravation against the features in mitigation be followed. (*Zant v. Stephens, supra; Jurek v. Texas, supra*) so long as the mitigating factors the jury may consider are not limited: *Lockett v. Ohio, supra.* In North Carolina, as in Florida, there is a specific balancing of aggravating and mitigating factors, thus insuring more procedural regularity than is constitutionally required. *Zant v. Stephens, supra.* The North Carolina instructions in no way limit what the jury may consider in mitigation or what weight to assign such factors.

Thus, North Carolina's jury instructions, even when read to remove consideration of the mitigating factors in the substantiality finding, are not unconstitutional since there is no limitation in the instructions on what the jury may consider in mitigation, *Lockett v. Ohio, supra,* and there is a full consideration of the mitigating factors in the balancing procedure.

In the present matter before the Court, the trial judge presented the issues to the jury in such a way that the substantiality finding was made by the jury after the aggravating and mitigating features were balanced. However, this juxtaposition of the issues does not render the instructions in this case violative of due process. That the final threshold was passed after the balancing is of no constitutional significance since it is clear this Court has approved several different ways of reaching the threshold of cases and the using of mitigating factors: *Jurek v. Texas, supra; Barclay v. Florida, supra; Zant v. Stephens, supra.* The final inquiry, since there can be "no per-

fect procedure for deciding in which cases governmental authority should be used to impose death," *Lockett v. Ohio, supra,* at 605 is whether the procedure employed in this case by the North Carolina trial court "assures reliability in the determination that 'death is the appropriate punishment in a specific case.'" *Smith v. North Carolina, supra,* at p. 622. In the matter before the Court, no matter how narrowly the substantiality instruction is read, the procedure employed by North Carolina clearly assured the reliability in the determination of the death sentence the Constitution demands.

Accordingly, this Court should deny McDougall's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Michael Van McDougall's petition for writ of certiorari should be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

JOAN HERRE BYERS
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-2011

Attorneys for Respondent